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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARC D. KEFFER
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

36pp

QUESTIONS PRESENTED

1. Whether, as the Sixth Circuit held in conflict with the Tenth Circuit, the NLRA employees' right to select a union representative and to bargain collectively through their representative, free of unlawfully motivated adverse employer action, is an "economic" right under *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), that is waived through the inclusion in a collective bargaining agreement of a provision authorizing only generally defined kinds of employer action.

2. Whether the standard for determining whether a collective bargaining agreement provision waives the employees' NLRA right to bargain through their chosen union representative is the *Metropolitan Edison* "clear and unmistakable waiver" standard, as the First, Second, Third, Fourth Fifth, Eighth, Ninth and Tenth Circuits have held, or the "contract coverage" standard applied by the D.C., Seventh and Sixth Circuits.

3. Whether the "termination" of a collective bargaining agreement, as opposed to its "expiration," relieve the employer and union parties of their statutory duty to bargain in good faith and to maintain the *status quo* as to the conditions in the terminated agreement?

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PETITION FOR A WRIT OF CERTIORARI

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit in *"Automatic" Sprinkler Corporation et al. v. NLRB*, 6th Circuit Nos. 95-6599 and 96-5159.

OPINIONS BELOW

The decision of the court of appeals is reported at 120 F.3d 612 (6th Cir. 1997) and is reproduced in the separately bound appendix to this certiorari petition ("Pet. App.") at pp. 1a - 21a. The court of appeals order denying rehearing and rehearing en banc is unreported and is reproduced at Pet. App. pp. 22a - 23a. The underlying decision and order of the National Labor Relations Board is reported at 319 NLRB 401 (1995) and is reproduced at Pet. App. pp. 26a - 95a.

JURISDICTION

The decision of the court of appeals issued on July 29, 1997. That court's order denying timely petitions for rehearing and suggestions for rehearing en banc issued on October 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 7, 8(a)(3), 8(a)(5) and 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158(a)(3), 158(a)(5) and 158(d), insofar as pertinent to this case are set out at Pet. App. pp. 96a-98a.

STATEMENT OF THE CASE

Since the early 1900's, "Automatic" Sprinkler Corporation of America ("Automatic") has been engaged throughout the United States in the business of installing, maintaining and inspecting automatic fire protection systems. Throughout this long history, Automatic has been party to collective bargaining

relationships with local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, ("U.A."), including U.A. Local 669, the Petitioner herein.

As of 1992, Automatic employed well over 300 skilled construction employees nationwide. Those employees were covered by twelve extant collective bargaining agreements, each covering an appropriate bargaining unit for National Labor Relations Act purposes, and the employees in each unit had chosen the U.A. local union in their area as their exclusive bargaining representative.

These collective bargaining agreements, like their predecessors, contained traditional "construction industry" subcontracting clauses that afforded Automatic the limited right to contract out fire protection system installation work, but only to contractors bound to U.A. collective bargaining agreements.[1] Those agreements were negotiated against the background that the major cost component of fire protection systems work is the cost of labor and that on the run of contracts there is little profit incentive for a company like Automatic to "buy" labor from a competitor through subcontracting. Indeed, the experience from 1979 to 1992 was that Automatic had invoked the subcontracting clause in its union agreements only in rare, out-of-the-ordinary circumstances, e.g., where it was necessary to supplement its existing workforce on unusually large

---

[1] *See Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 657 (1982) (so-called union signatory subcontracting clauses have, since before 1959, been "part of the pattern of collective bargaining in the construction industry").

construction projects, or to continue to operate during the occasional labor dispute.[2]

The collective bargaining agreements in force as of 1992 and outlined above were due to expire and to become open for renegotiation during the period from 1993 through 1995.

At their 1992 annual meeting, Automatic and Figgie International Inc., its corporate parent, jointly adopted what was termed the "Neutral Plan." That plan was designed to allow Automatic to continue in the business of installing and maintaining fire protection systems -- and to do so without its unionized employees or their bargaining representatives. Pursuant to this plan, all of Automatic's 300 union-represented employees in all the twelve bargaining units were to be *permanently* laid off, i.e. discharged, the twelve bargaining units were to become empty, legally irrelevant shells, and the underlying collective bargaining relationships to become legal nullities.

The terms of the "Neutral Plan" were stated in Automatic's official documents in black and white, and the hearing testimony at the National Labor Relations Board confirmed the substance of those documents. Pet. App. pp. 43a-47a (quoting "Neutral Plan" and summarizing testimony).

The first phase of the plan called for (i) the subcontracting of the labor component of all Automatic fire protection contracts to third-party labor contractors during the term of the extant collective bargaining agreements, (ii) the permanent layoff of all of Automatic's union sprinkler-fitter employees for "lack of work", (iii) the "termination" of the collective

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[2]Transcript of NLRB proceeding at 34, 63-65.

bargaining agreements as each expired, and (iv) the refusal to negotiate new agreements with the employees' union representatives on the asserted ground that Automatic no longer directly employed sprinkler-fitter employees and did not intend to directly employ any such employees in the future.

Under phase two of the Neutral Plan, Automatic would -- after the wholesale discharge of its unionized workforce and disengagement from its longstanding union relationships -- continue to secure contracts to install and maintain sprinkler systems in its own name, but on a *nonunion* basis, while having the labor on such installation and maintenance contracts provided either by employees of third party labor subcontractors or by newly-hired nonunion Automatic employees assigned from a new set of Automatic offices, established under the plan to perform unit work "as Neutral (nonunion) operations."

Automatic did not publicly disclose the "Neutral Plan," but rather maintained it in strict confidentiality; the plan was not even distributed internally by Automatic other than to a "select management group" excluding its Human Resource Director and its outside auditing firm. And, Automatic repeatedly misrepresented its intentions regarding its operational plans to the Union.

There can be no doubt that the purpose of the "Neutral Plan" was to retaliate against Automatic's employees for choosing to be represented by a union and electing to set their wages and working conditions through collective bargaining, and after -- and by reason of so doing -- to operate its business with nonunion employees and without collective bargaining. The documented rationale for the plan as adopted by Automatic was to, *inter alia*, "(e)liminate labor negotiations .

. . [and] cost associated with union grievances" so that Automatic could continue its sprinkler business while "not signatory to any union contract, . . . pay demands and . . . work rules." Pet. App. p. 44a.[3]

And, over the 1992-1994 period, Automatic carried out each of the elements of the clandestine plan precisely as drawn up.

Section 8(a)(3) of the National Labor Relations Act, as amended, makes it "an unfair labor practice for an employer -- (3) to discriminate in [employment] . . . to encourage or discourage membership in any labor organization . . . " Given all the foregoing--and given NLRA § 8(a)(3) -- the National Labor Relations Board concluded that Automatic's "Neutral Plan"-- and its implementation in order to discharge over 300 union employees and to sever 12 established

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[3]Automatic's dedication to ridding itself of its union employees and collective bargaining relationships was illustrated in a 1994 report by its outside auditors which underscored that substantial "added costs" had been incurred by Automatic on certain jobs so that the jobs could be finished and all union employees terminated *before* expiration of the collective bargaining agreements on March 31, 1994, so as to "justify" Automatic's refusal to bargain at that time. According to the auditors, Automatic district offices

> are striving to complete contracts before the end of March . . . when the union contracts will expire and the Division will outsource a majority of their labor. Districts are concerned that sufficient/competent labor will not be available under these outsourcing arrangements and thus are incurring large labor costs without regard to budget to complete all outstanding contracts before this time . . . These additional costs were a total surprise to [the auditors] during closing for January and February. Court of Appeals Joint Appendix Volume III, pp. 1112-13, 1115.

collective bargaining relationships with the end in view of enabling Automatic operate nonunion -- constituted plain § 8(a)(3) violations. In so doing, the Board

> . . . stress[ed] that in the Respondent's internal document containing the subcontracting plan titled "Pro Forma III-A" the Respondent stated that it expected to gain, inter alia, the following benefits from its subcontracting decision:
>
> > Gain *control* of labor costs [emphasis is original] . . . Eliminate labor negotiations; Eliminate costs associated with union grievances . . . Allow "Automatic" to become competitive against non-union contractors.
> >
> > *Thus, there is direct evidence here showing that the Respondent's decision to subcontract the unit work was discriminatorily motivated as it sought to rid itself of union-represented employees.* [Pet. App. p. 30a (emphasis added).]

And, the Board emphasized that Automatic "continues to install and maintain sprinkler systems . . . " Pet. App. p. 31a.

The National Labor Relations Act not only prohibits anti-union discrimination, but requires as well, through its § 8(a)(5), that an organized employer "bargain collectively with the representatives of his employees." That being so, the NLRB also found, as an independent matter, that Automatic violated § 8(a)(5) by implementing the plan without bargaining:

> It is clear that the Respondent's subcontracting decision was a mandatory subject of bargaining, . . .because the Respondent in effect substituted the subcontractors'

> employees for its own. . . [T]he most compelling proof of the Respondents' bad-faith bargaining in this case is our finding above that the subcontracting decision was discriminatorily motivated. [Pet. App. pp. 31a-32a, (citations omitted).]

Board Member Cohen concurred in the Board decision observing that because "the subcontracting violated Sec. 8(a)(3) . . . it [is] unnecessary to pass on whether that subcontracting also violated Sec. 8(a)(5) of the Act." 319 NLRB at 402, n.5.

On appeal, however, the Sixth Circuit reversed the NLRB in all respects. While the NLRB treated this case principally as a § 8(a)(3) union-discrimination case, and only secondarily as a case also raising an independent § 8(a)(5) refusal to bargain charge, the court of appeals proceeded the other way around, focusing first on the refusal to bargain issues rather than the antiunion motivation issue. That court ruled first that

> Petitioners and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements. . . . Because the collective bargaining agreements contained no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the Board had no authority to compel Petitioners to bargain with the unions over that subject . . . [Pet. App. p. 7a.][4]

---

[4]With respect to the Automatic's continuing obligation under the NLRA to negotiate new agreements, the panel held that

> Although when a collective bargaining agreement expires, an employer has a continuing duty to bargain in good faith and maintain the *status quo* as to conditions of employment in the expired agreement. . . it has no such duty at the agreement's

The court of appeals then transmuted its reading of the collective bargaining agreements' subcontracting clause and its concomitant conclusion of no §8(a)(5) violation into a ruling that the subcontracting clause constituted a waiver of the covered employees NLRA § 7/§8(a)(3) rights, all without disturbing the Board's factual findings that Automatic's actions were motivated by unlawful antiunion discrimination:

> . . . Petitioners . . . actions were justified under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is *legally erroneous*. [Pet. App. p. 15a, (emphasis added).]

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act is singular in the set of federal laws declaring and protecting employee rights in that the NLRA provides for the contractual waiver of some (but not all) of its statutory employee protections on some (but not all) showings of a manifestation in a labor contract of an intent to waive such rights.

This Court's decisions from *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), through *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), set the general -- and far from

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termination . . . Thus, when the collective bargaining agreements . . . terminated, rather than merely expired . . . Petitioners were relinquished of *any contractual or statutory obligations* to the unions. [Pet. App. p. 11a, (emphasis added).]

definite -- parameters of the NLRA waiver doctrine while leaving at large the question of which NLRA employee rights are waivable and the question of which contractual manifestations of a legally proper waiver are legally sufficient.

And, given the nature of NLRA protected employee rights and the nature of the issues dealt with by the parties in the NLRA system of free collective bargaining, these open NLRA waiver doctrine questions are implicated in almost every set of collective bargaining negotiations and are raised by the collective bargaining agreements that come out of those negotiations.

Not surprisingly, then, the uncertainties that surround these recurring questions have generated recurring litigation that has resulted in a set of conflicts in the courts of appeals.

The Sixth Circuit's decision here -- reversing the National Labor Relations Board's decision and holding that the Union, in agreeing to a standard form "construction industry" subcontracting clause, waived both the employees' NLRA §§7/8(a)(3) rights and their NLRA §§7/8(a)(5)/8(d) rights -- is in square conflict with the Tenth Circuit's decision in *Capitol Steel and Iron Co. v. NLRB,* 89 F.3d 692 (10th Cir. 1996), both with regard to the essentials of the NLRA waiver doctrine and with regard to the meaning and effect of labor contract provisions authorizing certain kinds of employer action during the contract term where the employer then acts from impermissible antiunion motives rather than from permissible business motives. *See* pp. 16-21 *infra.*

That conflict, moreover, reflects a deeper and broader circuit conflict on the scope and nature of the NLRA waiver doctrine. Consistent with the plain language, and with the

rationale, of this Court's *Metropolitan Edison* decision, the First, Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits follow the rule that waivers of NLRA statutory employee rights must be "clear and unmistakable." In contrast, the District of Columbia, the Seventh -- and with the instant decision -- the Sixth Circuits follow the rule that a showing that the employer action at issue is within an area "covered by" a term of the collective bargaining agreement is dispositive and that a showing of a "clear and unmistakable" waiver is unnecessary, *see* pp. 21-25 *infra*. *Dep't of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992).

The NLRA waiver doctrine questions presented here, moreover, go to the very essence of the Act. The NLRA statutory scheme -- and the free collective bargaining system -- rest on the basic right of employees to form, join and bargain collectively through their chosen union representative free of employer anti-union retaliation. That basic right is greatly diminished if it is determined to be defeasible in collective bargaining. For at that point an essential employee protection becomes a prize that must be won in employer-union tests of collective bargaining economic strength, rather than the legally-guaranteed basis from which collective bargaining over wages, working conditions and other economic matters can begin. And, that right becomes a pale shadow of itself if it is defeasible through a standard contractual agreement -- such as the subcontracting clause here and the wage-setting clause in *Capitol Steel* -- granting the employer an authority to act so as to meet business considerations during the contract term without any stated intent to thereby grant the employer an authority to act so as to mete out retribution to union employees for being union.

Equally to the point the uncertainties as to the NLRA waiver doctrine questions presented here put the NLRA collective bargaining system under the most severe strain in a way that threatens its productive capacities.

A particularly salutary office of collective bargaining is to facilitate agreements that harmonize the employer's need for the efficiencies that come from the flexibility to meet ever-changing economic exigencies as those continually arise with the employees' need for a binding employer commitment to providing them fair recompense for their productive work done under proper working conditions over the contract term. But, as this Court noted in the first of its NLRA waiver doctrine cases, labor contracts must be read "in the light of the law relating to [the contracts] when made," *Mastro Plastics*, 350 U.S. at 279, and the parties take that reality, along with others, into account in their bargaining.

That being so, the uncertainties as to the scope and nature of the law regarding waiver of NLRA-protected employee rights create concomitant uncertainties as to the meaning and effect of provisions granting the employer measured discretionary authority and those uncertainties can only frustrate this kind of creative and productive bargaining. Reaching agreement on such provisions is difficult at best because any such provision carries substantial, and all but unquantifiable, downside risks from the union and employee perspective. But those difficulties are as nothing where the contractual permission to act may be construed as going beyond employer actions motivated by *bona fide* business considerations and extending to actions motivated by unlawful anti-union retaliatory purpose as well. For that approach to reading labor contracts leaves a union worth its salt and with even a modicum of bargaining power literally no choice but to

oppose the inclusion of any such provision with all its available strength.

In short, the NLRA waiver doctrine questions presented here -- on which the court of appeals are in conflict -- are central to the proper effectuation of the Act and of the practice and procedure of collective bargaining the Act is designed to further. This Court therefore should grant this certiorari petition to resolve that conflict.

1. *This Court's NLRA Waiver Doctrine Decisions.* The NLRA, in common with the other federal labor standards laws, establishes a set of statutory employee rights; the two implicated here being the NLRA §§7/8(a)(3) right of employees to "form . . . [a] labor organization[ ] [and] to bargain collectively through [that] representative[ ] of their own choosing" without being subject to employer "discrimination in regard to [their] tenure of employment . . . to . . . discourage [their] membership in [that] labor organization," and the §§7/8(a)(5)/8(d) right of employees to bargain collectively through their union representative with their employer "with respect to [employer actions affecting their] wages, hours, and other terms and conditions of employment" including employer contracting out of the employees' work to other employees that results in the employees lay-off or termination.

While the governing rule under such statutes as Title VII of the Civil Rights Act is that "there can be no prospective waiver of an employee's rights," *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 51 (1974), the NLRA rule is a more nuanced one. In *Metropolitan Edison Co., supra*, the most recent NLRA waiver doctrine decision, the Court summarized its jurisprudence as follows:

> This Court long has recognized that a union may waive a member's statutorily protected rights, including "his right to strike during the contract term, and his right to refuse to cross a lawful picket line." *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) (footnotes omitted). Such waivers are valid because they "rest on 'the premise of fair representation' and presuppose that the selection of the bargaining representative 'remains free.'". *NLRB v. Magnavox Co.*, 414 U.S. 322, 325 (1974) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956); Cf. *NLRB v. Allis-Chalmers Manufacturing Co., supra,* at 180-181. Waiver should not undermine these premises. Thus a union may bargain away its members' economic rights, but it may not surrender rights to impair the employees' choice of their bargaining representative. *See NLRB v. Magnavox Co., supra,* at 325. [460 U.S. at 705-06.]

And, as to the general *Gardner-Denver* rule noted above, the Court added:

> The union contends that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), demonstrates that the individual right not to be discriminated against may never be waived. In *Gardner-Denver*, however, we noted that waiver would be inconsistent with the purposes of the statute at issue there. As discussed above, the National Labor Relations Act contemplates that individual rights may be waived by the union so

long as the union does not breach its duty of good-faith representation. [460 U.S. at 706 n.11.][5]

---

[5]The *Mastro Plastics* decision is the source for -- and its reasoning serves to illuminate -- *Metropolitan Edison's* basic "economic rights/ choice of representative rights" dichotomy:

> The [NLRA's] policies . . . depend for their foundation upon assurance of "full freedom of association." *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining "the normal flow of commerce and . . . the full production of articles and commodities . . . ." 61 Stat. 136, 29 U.S.C. § 141(b).
>
> On the premise of fair representation, collective-bargaining contracts recently have included certain waivers of the employees' right to strike and of the employers' right to lockout to enforce their respective economic demands during the term of those contracts. *Provided the selection of the bargaining representative remains free*, such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules . . .
>
> Petitioners argue that the words "any strike" [in the no-strike clause] leave no room for interpretation and necessarily include all strikes, even those against *unlawful practices destructive of the foundation on which collective bargaining must rest*. We disagree. We believe that the contract, taken as a whole, deals solely with the economic relationship between the employers and their employees . . . Its strike and lockout clauses are natural adjuncts of an operating policy aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships . . . .
>
> To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, *even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union*. [350 U.S. at 280-83, second and third emphases added.]

At the same time, *Metropolitan Edison,* drawing on *Mastro Plastics*, makes it plain that a union's collective bargaining waiver of NLRA statutory employee rights is not to be lightly inferred:

> In *Mastro Plastics Corp., supra*, the question was whether a general no-strike provision waived the specific right to strike over an unfair labor practice. While reserving the question whether a union might waive this right if it were "explicitly stated," the Court determined that "there is no adequate basis for implying [the] existence [of waiver] without a more compelling expression of it than appears in . . . this contract." 350 U.S. at 283. Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable. [460 U.S. at 707-08, footnote omitted.][6]

2. *Waivers of Employee Rights Against Unlawfully Motivated Employer Action.* (a) The Sixth Circuit, as we have seen, treated the employee right to select a union representative and

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[6]In the footnote to the foregoing, the Court harmonized the *Metropolitan Edison* "clear and unmistakable waiver" rule and "the holding in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)," as follows:

> There the Court found that a contract provision establishing that a dispute shall be settled exclusively and finally by compulsory arbitration makes clear that the union may not strike over such a dispute. See *id.*, at 105. *Lucas Flour* established that there does not have to be an express waiver of statutory rights, but waiver was implied in the situation only because of the unique conjunction between arbitration and no-strike clauses. Cf. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974). [460 U.S. at 708 n.12.]

to bargain collectively through that representative free of adverse employer actions in retaliation for the employees' exercise of that right as a waivable "economic right" under *Metropolitan Edison* and the inclusion in a collective bargaining agreement of a standard form "construction industry" subcontracting clause, standing alone, as sufficient to effect the waiver of that right.

The Tenth Circuit's *Capitol Steel* decision interprets *Metropolitan Edison* and the NLRA waiver doctrine as being precisely to the opposite. *Capitol Steel* rests on a thoughtful, balanced analysis of the NLRA waiver doctrine question presented here and we therefore set out that opinion at some length. The Tenth Circuit began by setting out the parties' opposing contentions:

> . . . Capitol argues that the wage increase provision in the Agreement gave it the absolute right to increase or decrease any employees' wages whenever and however it chose, if those wages remained above the prescribed minimum of $5.50 per hour. It asserts that the exercise of a valid contractual right cannot be the basis for an unfair labor practice finding. The cases upon which the Company relies for this premise, however, are not dispositive because they fail to address specifically the present context: the exercise of an otherwise valid right in a manner designed to undermine the Union . . .
>
> For its part, the Board asserts that by granting a wage increase in a manner designed to undermine the Union's status as the employees' exclusive bargaining representative, the Company failed to carry out its obligation to bargain in good faith . . . [89 F.3d at 696.]

The Tenth Circuit then analyzed the matter before it as follows:

> Although waiver provision are an acceptable and potentially beneficial part of the collective bargaining process, it does not follow that we should countenance the calculated use of such clauses to undermine the process. It is difficult to imagine a clearer example of an employer granting a benefit in such a manner as to undermine the collective bargaining process than the present case. The ALJ made the following findings, which are supported by substantial evidence in the record:
>
> > Respondent . . . [granted the increases] unilaterally, while engaged in collective bargaining with the Union. In that bargaining, Respondent had refused to make any proposal for a wage increase, had stated that it could not agree to having any minimum wages set by negotiation, and in virtually the same breath with its announcement of the unilateral increases, had stressed its perilous financial condition. Moreover, Nesom [Capitol Steel's President] misstated how long the increases had been under consideration . . . He also mislead [sic] the Union about when the employees would learn of this increase, ...
> >
> > Most significantly, as Nesom admitted, the increases were announced in such a way and at such a time as to sway the employees who would immediately thereafter vote on Respondent's "last and final offer." Indeed, the manner in which Ozment passed out the notices to Clay and Prock at the ratification meeting was calculated to sow dissension and demean the role of the Union.

Capitol Steel, 317 NLRB at 813.

> We agree with the Board that the timing and manner in which Capitol gave out raises to its employees violated its duty to bargain. We presume the Union gained something in exchange for waiving its right to bargain over wages, and we acknowledge the importance of the waiver principle to the bargaining process. However, we decline to endorse the notion that that principle can be implemented to subvert that process. The provision in question here entitled the Company to implement raises unilaterally during the term of the contract. However, when the Company undermined the union's role as the employees' sole bargaining agent by raising wages in a manner engineered to influence employees to vote in its favor at a key moment in the bargaining process, it improperly exploited that waiver and violated §§8(a)(5) and (1) of the NLRA. [89 F.3d at 697.]

(b) The Sixth Circuit's ruling here could not be more wrong and the Tenth Circuit's *Capitol Steel* ruling could not be more right.

The NLRA § 7 right to "form . . . [a] labor organization[ ] and to bargain collectively through [that] representative[ ] of their own choosing . . ." is not an empty right devoid of substance. Out of the experience of the 1930's, and the failure of the first, unenforceable National Labor Relations Act, the sponsors of the Wagner Act provided employees the substantial protections of § 8(a)(3)'s prohibition of employer "discrimination in regard to [the employees'] tenure of employment . . . to discourage [their] membership in [that] labor organization." The heart of that unfair labor practice, and

of the NLRA's protection for employees in forming and bargaining through a union, is the prohibition on adverse employer action born of anti-union motive.[7] As the Wagner Act Senate Report said:

> [I]f the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work. [S.Rep. No. 573 on S.1958, 74th Cong., 1st Sess., 11 (1935).]

And as Senator Walsh, the Act's floor manager added:

> The employer has the economic power; he can discharge any employee or any group of employees when their only offense may be to seek to form a legitimate organization among the workers for the purpose of collective bargaining. This bill declares that this is wrong. It declares that the employee has the right to engage in collective bargaining, and it says, 'Mr. Employer, you must keep your hands off; you shall not use that effective power of dismissal from employment which you have and destroy the organization of the employees by the dismissal of one or more of your employees when they are objectionable on no other ground than that they belong to or have

---

[7]Obviously, the employee right to bargain collectively, through their chosen representative, free from unlawfully motivated employer action designed to undermine or frustrate such activity, is likewise fundamental to the purposes of the NLRA, as the 10th Circuit recognized. *Capitol Steel*, 89 F.3d at 696-97.

> organized a labor organization. [79 Cong.Rec. 7658 (1935).]

In terms of the *Metropolitan Edison* economic rights/choice of representative rights dichotomy, then, the right to form and bargain through a union representative free of employer anti-union retaliation is most assuredly in the latter category. As such it is not a waivable right at all.

And, if there be any room left for doubt on this score, *Mastro Plastics* makes it plain that the §§7/8(a)(3) statutory protection against employer action taken for unlawful anti-union purpose is not waived by a labor contract clause like the standard-form "construction industry" subcontracting clause here. As *Mastro Plastics* says, such provisions are properly read as "deal[ing] solely with the economic relations between the employer[] and [the] employees" and not as authorizing "unlawful [employer] practices destructive of the foundation on which collective bargaining must rest," such as employer action "by coercion [to] oust[ ] the employees' lawful bargaining representative." 350 U.S. at 282-83.

3. *The "Clear and Unmistakable Waiver" Doctrine/"Contract Coverage" Doctrine Conflict in the Circuits.* The Sixth Circuit treated separately with the employees' § 7/8(a)(3) rights at issue here and their §§ 7/8(a)(5)/8(d) rights. In the later regard, the court below ruled that the standard-form "construction industry" subcontracting clause in this case sanctioned Automatic's implementation of its unlawfully motivated "Neutral Plan" without Automatic having bargained over the plan with the Unions -- i.e. that the subcontracting clause standing alone waived the employees' right to bargain collectively over the "Neutral Plan":

> Petitioners and the unions . . . memorialized [a] bargain in their respective collective bargaining agreements. . . . Because the collective bargaining agreements contained no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the Board had no authority to compel Petitioners to bargain with the unions over that subject . . . [Pet. App. p. 7a.]

That ruling deepens an already pronounced conflict in the circuits.

Nine of the courts of appeal continue to hew to the *Metropolitan Edison* "clear and unmistakable" waiver rule. *E.g., NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1037 (10th Cir. 1996) (right to bargain over effects of employer's decision to subcontract work); *Porta-King Bldg. Systems v. NLRB*, 14 F.3d 1258, 1263 (8th Cir. 1994) (right to bargain over layoffs); *NLRB v. New York Telephone Co.*, 930 F.2d 1009, 1011 (2nd Cir. 1991) (right to information); *NLRB v. Litton Fin. Printing Div.*, 893 F.2d 1128, 1135 n.6 (9th Cir. 1990), *rev'd in part* 501 U.S. 190 (1991) (right to bargain over layoffs); *Prudential Ins. Co. v. NLRB.*, 661 F.2d 398, 400-402 (5th Cir. 1981) (right to union representation); *Communications Workers of America v. NLRB*, 644 F.2d 923, 928 (1st Cir. 1981); *Radio Television Technical School Inc. v. NLRB*, 488 F.2d 457, 461 (3rd Cir. 1973); *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129-30 (4th Cir. 1979) (waiver must be "knowing, clear and unequivocal").

The essential point of all these cases is that the "national labor policy disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed." *C&P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2nd Cir. 1982). And, all recognize that a

contract clause like the subcontracting clause here is not a clear and unmistakable waiver of the employees' right to bargain over a novel, later-conceived employer device of the kind and dimension of the "Neutral Plan."

With the instant decision, the Sixth Circuit joins the Seventh and D.C. Circuits in rejecting the *Metropolitan Edison* rule in cases where the employer invokes a labor contract clause authorizing certain generally defined kinds of employer action as a waiver of the employees' collective bargaining rights in favor of a "contract coverage" rule.[8]

The D.C. Circuit has been the leader of this band of three. *See, e.g., Conoco Inc. v. NLRB*, 91 F.3d 1523, 1528 (D.C. Cir. 1996) (where employer asserts contractual defense to refusal to bargain charge, resolution "rests on an interpretation of the [collective bargaining agreement]" without resort to "clear and unmistakable" standard.); *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836-37 (D.C. Cir. 1993), *denying enf'ment to* 306 NLRB 640 (1992) (rejecting "clear and unmistakable" standard in deciding whether employer had to bargain over cost-cutting measures); *Connors v. Link Coal Co., Inc.*, 970 F.2d 902, 905 (D.C. Cir. 1992), quoting *Dept. of Navy v. FLRA,* 962 F.2d 48 (D.C. Cir. 1992) ("A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain over a matter); *Local 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991)(in examining contract to see whether there is a right to bargain, Supreme Court's waiver jurisprudence inapplicable).

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[8]The Sixth Circuit had presaged its decision in the instant case in *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995), *granting enforcement in part to* 312 NLRB 1075 (1993), in which that court rejected the Board's application of the "clear and unmistakable" waiver analysis in the context of bargaining over the elimination of a hospital's shift program.

Indeed, the D.C. Circuit has expressed "doubt as to whether the Board's requirement of a 'clear and unmistakable' waiver is even appropriate when interpreting a collective bargaining contract." *Utility Workers v. NLRB*, 39 F.3d 1210, 1215-16 (D.C. Cir. 1994).

Then, in *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 1936-37 (7th Cir. 1992), *denying enforcement to* 304 NLRB 495 (1991), the Seventh Circuit followed suit in rejecting the Board's decision that the general language in a management rights clause did not constitute a waiver of the right to bargain over a newly implemented drug testing program. In so doing, Judge Posner

> wonder[ed] what the exact force of the "clear and unmistakable" waiver principle can be when the parties have an express written contract and the issue is what it means, or whether the principle makes much sense now that . . . even a waiver of precious constitutional rights need not be proven by clear and convincing evidence. [974 F.2d at 936-37.]

And, his opinion then posits that "the doctrine of waiver" is totally distinct from the relevant "question of [contract] interpretation;" queries whether "the 'clear and unmistakable' principle . . . makes much sense;" criticizes the *Metropolitan Edison* rule as one "that tilts decision in the union's favor" and, quoting the D.C. Circuit, ultimately finds the "clear and unmistakable waiver" doctrine to be "irrelevant." *Id.*

This is not a disagreement in the law on the way to curing itself. The Board has recently reaffirmed its allegiance to the

"clear and unmistakable waiver" doctrine and rejected the contrary views of Seventh and D.C. Circuits stating that

> [W]e adhere to our clear-and-unmistakable-waiver standard and decline to apply a less rigid "contract coverage" test when determining whether contract language may be invoked as a defense to an alleged failure to bargain over changes in mandatory subjects. The Supreme Court has upheld the clear-and-unmistakable-waiver standard when discussing the impact of a contractual provision on the waiver of a statutory right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). [*Exxon Research and Engineering Co.*, 317 NLRB 675 (1995).][9]

And, we submit, the need for this Court's review is made all the more compelling by the fact that this disagreement is generated by court of appeals decisions already -- and we would venture to say inappropriately -- dismissing the Court's *Metropolitan Edison* decision as an irrelevancy.

4. *The Court of Appeals' § 8(d) "Contract Termination" Ruling.* In rejecting the NLRB's finding that Automatic violated § 8(a)(5) by refusing to bargain with the Union after

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[9]For an analysis and discussion of the varying approaches of the courts of appeals and the Board on this issue, see Carron and Broughton, *When is "No" Really "No"? - The NLRB's Current Position on the Freedom of Contract, Management Rights, and Waiver*, 13 THE LAB. LAW. 299 (1997); Wagner, *"No" Means "No" When a Party Really Says So: The NLRB's Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases*, 13 THE LAB. LAW. 325 (1997) (noting conflict in courts of appeal over Board's continuing application of "clear and unmistakable waiver" analysis, and urging Board to "consider seeking review of an appropriate case in the Supreme Court.")

the collective bargaining agreement had come to an end, the Sixth Circuit held that "when a collective bargaining agreement *expires*, an employer has a continuing duty to bargain in good faith and maintain the *status quo* . . ." but that an employer "has no such absolute duty at the agreement's *termination* . . ." Pet. App. p. 11a, (emphasis added).

While we recognize that this holding, standing on its own, does not generate a question that provides a sufficient basis for a *certiorari* grant here, we would be derelict if we did not show that the ruling is plainly erroneous, is mischievous in the extreme and warrants review (and correction) in connection with review of the foregoing *cert*-worthy questions.

Very simply stated, NLRA § 8(d) *obligates* a party to a collective bargaining agreement, as a precondition to the initiation of bargaining a new agreement and thereby fulfilling the continuing duty to bargain in good faith, to send notice to "the other party to the contract of the proposed *termination* . . . " of the extant agreement. 29 U.S.C. § 158 (d)(1). And, that is therefore what parties do in the run of situations in which a collective bargaining agreement is coming to an end -- they send a notice of *termination, not* a notice of expiration.

Thus, what, under the Act, is the sounding of the opening bell on fulfilling the § 8(a)(5) duty to negotiate in good faith for a new agreement -- the notice formally terminating the extant agreement -- the Sixth Circuit decision makes into a death knell for any and all employer § 8(a)(5) duties and obligations. It is worth emphasizing that, given § 8(d)'s terms and the collective bargaining practices that have crystallized around that provision, the Sixth Circuit's holding is an invitation to industrial chaos. By sending a statutorily required notice for

the opening of bargaining, the employer, according to the panel, would end that very obligation.

That reading of §§ 8(a)(5) and 8(d), we submit, turns the statute against itself. The purpose of the statutory notice obligations in Section 8(d) is not to pretermit the bargaining process but to provide ample notice of a forthcoming contract "termination" so as to facilitate collective bargaining during period following the notice of termination and prior to any resort by the parties to self-help. *E.g.*, *Amax Coal Co. v. NLRB*, 614 F.2d 872, 889 (3rd Cir. 1980), *rev'd on other grounds* 453 U.S. 322 (1981); *Hooker Chemicals & Plastics Corp. v. NLRB*, 573 F.2d 965, 970 (7th Cir. 1978); *United Furniture Workers v. NLRB*, 336 F.2d 738, 740-41 (D.C. Cir. 1964).

That being so, so far as we have found no other court of appeals has embraced the legal proposition on the effect of "terminating" a contract stated in the Sixth Circuit decision.[10] Indeed, the panel decision is squarely contrary to the long line of decisions recognizing that, after a notice of termination, the employer has a continuing §§ 8(a)(5) and 8(d) obligation not simply to recognize and bargain with the union, but also to maintain the *status quo ante* created by the "terminated" collective bargain agreement. *See e.g., Litton Financial Printing v. NLRB*, 501 U.S. 190, 198-99 (1991); *United*

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[10]To be sure, the panel cited *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22 (2nd Cir. 1988). But *Derrico* turned on the issue of whether a terminated or expired collective bargaining agreement will afford jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 -- the provision providing for court enforcement of collective bargaining agreements -- and in addressing that issue, *Derrico* notes that, *under the* § 8(a)(5) *of the NLRA*, once an agreement has terminated the employer is required to bargain with the union and also to maintain the *status quo*. 844 F.2d at 26-27.

Paperworkers International Union, Local 274 v. Champion International Corp., 81 F.3d 798, 801-802 (8th Cir. 1996); *Intermountain Rural Electric Association v. NLRB*, 984 F.2d 1562, 1566 (10th Cir. 1993); *NLRB v. Transport Service Co.*, 973 F.2d 562, 567 (7th Cir. 1992).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM W. OSBORNE, JR.,
MARC D. KEFFER
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Supreme Court, U.S.
FILED

97 1249 JAN 28 1998

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARC D. KEFFER
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-6599; 96-5159

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC.,
Petitioners/Cross-Respondents,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Argued December 5, 1996 Decided July 29, 1997

Before WELLFORD, RYAN, and SILER, Circuit Judges

Donald F. Woodcock (Todd F. Palmer on brief) for Petitioner; David Seid, Attorney, National Labor Relations Board (Peter

Winkler, Attorney, National Labor Relations Board on brief) for Respondent; William W. Osborne, Jr., for Intervenor.

SILER, Circuit Judge:

Figgie International Inc. ("Figgie") and "Automatic" Sprinkler Corporation of America ("Automatic"), a division of Figgie (collectively, "Petitioners"), petition this court to review the Decision and Order by the National Labor Relations Board ("NLRB" or "the Board") finding that Petitioners violated section 8(a)(1), (5), and (3) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), (5), and (3), by subcontracting bargaining unit work and discriminatorily laying off their employees represented by the unions and by refusing to bargain with the unions that had bargaining status over the decision to subcontract unit work as well as over successor collective bargaining agreements. The NLRB filed a cross-application for enforcement of its Order, and Road Sprinkler Fitters Local Union No. 699 ("Local 699") intervened in this action on the side of the NLRB. For reasons stated herein, we will VACATE the Order of the Board and DENY its enforcement.

I.

Automatic is engaged in the design, fabrication, and installation of automatic fire protection systems. For many years it employed members of Local 669 as well as members of eleven other urban autonomous unions -namely Local 120, Local 281, Local 314, Local 483, Local 536, Local 542, Local 676, Local 692, Local 696, Local 699, and Local 709 --to install these systems.[1] Through its membership in a multi-employer association of sprinkler installation contractors,

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[1]Local 699 and the other unions mentioned belong to the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

the National Fire Sprinkler Association ("NFSA"), Automatic had successive collective bargaining agreements with the unions for many years. The expiration dates of the agreements ranged from July 31, 1993 to June 30, 1995. With the exception of Automatic's agreement with Local 483, all of the collective bargaining agreements contained a provision permitting subcontracting of work to employers who were signatories to the respective local agreements.

In recent years, Automatic had been experiencing financial difficulties. Each year officers and representatives of Figgie and Automatic held meetings to review past company performances and plan for the future. The annual meetings resulted in "hardcore" plans, which are five-year budget projection plans that were modified, updated, and extended yearly. At the annual meeting held in November 1992, the officers and representatives agreed to a plan (the "Neutral Plan"), in which Automatic would become a general contractor and would subcontract out all sprinkler fitter work upon the expiration of its collective bargaining agreements with the unions by August 31, 1995.

The Neutral Plan was expected to result in various benefits, including: gaining control of labor costs; elimination of negotiations with unions and the cost of grievances; minimization of excessive labor costs on some contracts; reduction of administrative labor costs and vehicle costs; elimination of road tool costs; ability to bid both union and non-union projects; and entrance into the residential market.

Automatic withdrew its membership in NFSA by a letter dated February 10, 1993. On the following day, it sent letters to the local unions representing Automatic sprinkler fitters notifying them of the withdrawal. These letters did not mention the Neutral Plan. Automatic thereafter increased its subcontracting, but limited it to contractors that had collective bargaining agreements with the unions as required under its agreements with the unions.

On May 26, 1993, Automatic gave Local 483 and Local 709 notice of termination of the collective bargaining agreements effective August 1, 1993 and September 1, 1993, respectively, pursuant to the terms of the agreements. On January 28, 1994, Automatic notified the remaining unions of its intent not to renew the collective bargaining agreements and of its decision to fundamentally change the nature of its business by becoming a general contractor, whereby it would no longer employ persons represented by the unions in the installation, alteration, maintenance, repair and service of fire control systems. In each of the January 28 letters, Automatic assured the unions that it would negotiate with them in good faith concerning its business decision. The ensuing exchanges between Automatic and the unions varied. The Board found that Automatic refused to negotiate successor bargaining agreements with any of the unions.

Between August 17, 1993 and May 12, 1994, Automatic met with many of the unions to discuss its subcontracting decision. By April 1, 1994, Automatic laid off all of its sprinkler fitter employees, and by June 30, 1994, it liquidated substantially all of its construction vehicles, tools, and equipment formerly used to perform labor work on its sprinkler installation operations. Since that time, Automatic has subcontracted virtually all of its labor work to entities that have signed current collective bargaining agreements with the unions.

Between August 1993 and May 1994, the unions filed unfair labor charges with the NLRB against Petitioners. After conducting a hearing on this matter, an Administrative Law Judge ("ALJ") found against Petitioners. On October 25, 1995, the Board affirmed the rulings, findings, and conclusions of the ALJ.

II.

We accept the Board's factual findings if supported by

substantial evidence on the record as a whole. 29 U.S.C. § 160(f); *YHA, Inc. v. NLRB*, 2 F.3d 168, 172 (6th Cir. 1993). We also review the Board's application of law to particular facts under the substantial evidence standard, but review the Board's conclusions of law de novo. *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 368 (6th Cir. 1993). If the Board erred in determining the proper legal standard, we may refuse enforcement of the Board's order on the ground that it has no "reasonable basis in law." *Id.*; *NLRB v. Brown*, 380 U.S. 278, 291-92, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965) (requiring reviewing courts to set aside interpretations of the Act by the Board that are inconsistent with statutory mandate, frustrate congressional policy or rest on an erroneous legal foundation). We review de novo the Board's interpretation of contract terms. *Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255, 1261 (6th Cir. 1995).

In reviewing the Board's interpretation of the NLRA, we adhere to the standard of review established by *Holly Farms Corp. v. NLRB*, ___ U.S. ___, 116 S. Ct. 1396 (1996). *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115 (6th Cir. July 11, 1997).

> Under this standard, our first task is to determine "whether Congress has directly spoken to the precise question at issue." [*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).] If Congress has done so, we must give effect to its expression. *Id.* at 842-43. If not, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. *Accord Holly Farms*, 116 S. Ct. at 1406.

Webcor, slip op. at 6 (footnote omitted.)

III.

Under section 8(a)(5) of the Act, an employer commits an

unfair labor practice by refusing to bargain collectively with its employees' representatives in good faith concerning "wages, hours, and other terms or conditions of employment." 29 U.S.C. § 158(a)(5). An employer violates section 8(a)(1) and (5) of the Act if it takes unilateral action regarding a mandatory subject of bargaining without first bargaining to impasse. *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 901 (6th Cir. 1996).

An employer's decision to subcontract work is considered a statutory subject of collective bargaining when it involves "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." *See Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 215, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964). The Board found that Petitioners' subcontracting decision was a mandatory subject of bargaining because they in effect substituted the subcontractors' employees for their own. Petitioners contend, however, that because subcontracting was already a subject covered by the collective bargaining agreement, further bargaining on that subject was foreclosed. We find, contrary to the arguments of the Board and the union intervenor, that Petitioners raised the issue of their contractual right to subcontract in their submission to the Board and that this important issue is before us on appeal. It is not subsumed by claims of anti-union motivation.

> When an employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules that govern their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain with respect to a matter covered by the contract. Thus, we are bound to enforce lawful labor agreements as written.

Gratiot Community Hosp., 51 F.3d at 1261 (citing *NLRB v. United States Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993)). *See also United Mine Workers of Am. v. NLRB*, 879 F.2d 939,

942-44 (D.C. Cir. 1989) (holding that provisions on subcontracting in collective bargaining agreement satisfied company's statutory duty to bargain over the subject of subcontracting).

Here, Petitioners and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements. This bargain permitted Petitioners to contract out work as long as it was to a contractor who had a collective bargaining agreement with the local union. Because the collective bargaining agreements contained no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the Board had no authority to compel Petitioners to bargain with the unions over that subject. *See United Mine Workers*, 879 F.2d at 943 ("'[W]hile the Board has the authority to compel enforcement of terms of a negotiated agreement, it cannot compel enforcement of terms that are not contained in that agreement.'")(quoting *Hyatt Management Corp. v. NLRB*, 817 F.2d 140, 143 (D.C. Cir. 1987)) (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102, 25 L. Ed. 2d 146, 90 S. Ct. 821 (1970)).

The Board likewise lacked the authority to order Petitioners to reinstate the subcontracted operations that employees represented by the union formerly performed and to reinstate with back pay all employees who were terminated as a result of the permissible subcontracting. The Board is not authorized to "'compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.'" *United Mine Workers*, 879 F.2d at 943 (quoting *H.K. Porter*, 397 U.S. at 106); *see also United States Postal Serv.*, 8 F.3d at 836 (stating that a lawful agreement may not be abrogated by the Board or by the courts merely because one party is unhappy with a term of the contract).

In *Gratiot Community Hospital*, 51 F.3d at 1260, the Sixth Circuit considered the issue of whether a hospital violated

section 8(a)(5) of the Act by failing to bargain with the union over the hospital's elimination of a staffing procedure called the "7/70" program by reducing the nursing staff teams to zero. The relevant provision in the collective bargaining agreement read as follows:

> Assignments to the Seventy Hour Shift will be made by the Director of Nursing in cooperation with the employees involved. The Director of Nursing will decide the number of assignments and the work areas that will be under the Seventy Hour Shift. . . .

Id.

Due to severe financial losses, the hospital unilaterally eliminated the 7/70 program as one of its several cost-cutting measures. *Id.* at 1257-58. As a result, some nurses were laid off or bumped to part-time positions, thereby losing their health benefits. *Id.* at 1258.

This court disagreed with the ALJ's conclusion that although the collective bargaining agreement permitted the hospital to determine the specific number of assignments to the 7/70 program, it neither stated nor implied that the hospital could unilaterally abolish the program altogether. *Id.* at 1261. Instead, we found that the actions by the hospital did not violate the Act because the language in the collective bargaining agreement clearly and unambiguously granted the hospital the authority to determine the number of shifts, including zero, in the 7/70 program. *Id.*

Similarly, the language in the collective bargaining agreements in the present case unambiguously granted Petitioners the authority to subcontract work, without limitation, provided it was to contractors that had agreements with the unions. During the term of the agreements, Petitioners

restricted their subcontracting to union contractors.[2] As mentioned above, we are bound, as is the Board, to enforce the lawful labor agreements between Petitioners and the unions as written. By determining that Petitioners violated section 8(a)(5) by refusing to bargain with the unions concerning their decision to subcontract to union signatories during the term of the agreements, the Board has refused to give meaning and effect to the parties' contractual provisions concerning subcontracting. Such a determination frustrates one of the fundamental policies of the Act: the freedom of contract. *See United Mine Workers*, 879 F.2d at 943.

Furthermore, according to the ALJ, the "agreements were terminated." Neither the ALJ nor the Board determined that the agreements with the eight local unions that had section 9(a) bargaining status -- Locals 669, 692, 536, 281, 314, 699, 483, and 709[3] -- were ineffectively terminated either under the

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[2]The unions maintained that Petitioners subcontracted during the terms of certain collective bargaining agreements with several nonunion subcontractors, but the ALJ found to the contrary where his decision shows that after Automatic withdrew its membership in NFSA, it "increased its subcontracting but apparently restricted it to union employers signatory to the union's collective bargaining agreements with NFSA" and that it "had carefully avoided any overt subcontracting to nonunion employers prior to its January 28, 1994 notice of intention to destroy all its union sprinkler fitter units as circumstances permitted, i.e., contract terminations." ALJ Decision (Dec. 30, 1994), *reprinted in "Automatic" Sprinkler Corp. of Am.*, 319 N.L.R.B. No. 57, 1995 WL 630836, at *4, *9, *25 (Oct. 25, 1995). These findings are not clearly erroneous.

[3]As the Board noted, because Locals 120, 542, 676, and 696 maintained a section 8(f) relationship with Automatic, Automatic was permitted to repudiate that relationship upon expiration of the agreements. *See John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. International Assn. of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988).

contracts' terms[4] or under the Act.[5]

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[4]Each agreement contains a "duration of agreement" provision along with provisions concerning the renewal of the agreement that can be interpreted as giving to either party the right to terminate the agreement provided certain notice requirements are met. Petitioners provided adequate and timely notice to each of the unions of their intent to terminate the collective bargaining agreements. *See New York News Inc. v. Newspaper Guild of New York*, 927 F.2d 82, 84 (2d Cir. 1991) (upholding district court's determination that employer properly terminated collective bargaining agreement pursuant to its terms when it sent union written notice of termination after expiration of the agreement); *see also International Brotherhood of Elec. Workers, Local 26 v. Advin Elec., Inc.*, 98 F.3d 161, 164-65 (4th Cir. 1996) (finding letters sent by employer to union indicating its desire to terminate the collective bargaining agreement upon its expiration effectively terminated agreement).

[5]Section (8)(d) of the Act states:

> The duty to bargain collectively shall also mean that no party to [a collective bargaining] contract shall terminate . . . such contract unless the party desiring such termination . . .
>
> (1) serves a written notice upon the other party to the contract of the proposed termination . . . sixty days prior to the expiration date thereof, . . .;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract . . .;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies [any similar state agencies]; and
>
> (4) continues in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

29 U.S.C. § 158(d)(1)-(4). Petitioners served timely written notice upon each union of the proposed termination, and they also offered to meet and confer with the unions, although apparently not for the purpose of negotiating a new contract. Additionally, Petitioners complied with the fourth requirement. Subcontracting was limited to union signatories during the term of the agreements and the Plan did not call for the contracting out

Although when a collective bargaining agreement expires, an employer has a continuing duty to bargain in good faith and maintain the *status quo* as to conditions of employment in the expired agreement, *see Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir. 1996), it has no such absolute duty at the agreement's termination. *Cf. Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26-27 (2d Cir. 1988) ("Rights and duties under a collective bargaining agreement do not otherwise survive the contract's termination at an agreed expiration date.") Thus, when the collective bargaining agreements between Petitioners and the unions with section 9(a) bargaining status terminated, rather than merely expired, upon their respective expiration dates, and because the agreements did not provide otherwise, Petitioners were relinquished of any contractual or statutory obligations to the unions. They cannot now be forced to negotiate new agreements with the unions or be prohibited from engaging in nonunion subcontracting. As the Supreme Court has stated, "The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract or hiring individuals on whatever terms' the employer 'may by unilateral action determine.'" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 81 L. Ed. 893, 57 S. Ct. 615 (1937).

The Board relies principally upon *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964), for its position. That case involved an employer's decision which did not change its basic operations. The employer simply decided, *inside its plant*, to subcontract out its maintenance work to save costs. There was *nothing in the collective bargaining agreement* about the employer's right

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of work until after the agreements were terminated. The record does not mention whether notification was given to the Federal Mediation and Conciliation Service.

to subcontract. There was no intimation whether the subcontract was, or was not, a union company. These facts and distinctions clearly make *Fibreboard* distinguishable from those of the instant case. The narrow question was whether mandatory bargaining on this "type of subcontracting out decision" was indicated; the decision did "not encompass other forms of 'contracting out' or 'subcontracting.'" *Id.* at 215.

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.

Id. at 213.

As put by Justice Stewart in his concurring opinion in *Fibreboard*, the question of whether an employer fulfilled its duty to bargain over its subcontracting decisions "goes to the scope of the employer's duty in the absence of a collective bargaining agreement." *Id.* at 219 (Stewart, J., concurring). In our case, of course, there was a collective bargaining agreement hammered out by the parties, expressly setting out the employer's right to subcontract.

The later Supreme Court authority, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 69 L. Ed. 2d 318, 101 S. Ct. 2573 (1981), is more pertinent to our case. In the latter case, the employer's decision involved "a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all." *Id.* at 677. The Court determined in that case that the employer's decision to cut back and terminate certain union employees, a partial layoff, was not an unfair labor practice under the circumstances.

> We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(d)'s "terms and conditions," . . . .

Id. at 686 (footnotes omitted). To be sure, neither *Fibreboard* nor *First National* involved the case where, as here, the employer and the local unions had already bargained and provided for the specific right to subcontract or to layoff for economic reasons.

This court has pointed out the pertinent language from the Supreme Court decisions on this issue:

> Despite the importance of give and take between management and labor on many issues, Congress has required mandatory bargaining on matters concerning only "'wages, hours, and other terms and conditions of employment.'" *First Nat'l*, 452 U.S. at 674 . . . (quoting § 158(d)).
>
> Congress did not intend to mandate bargaining over every conceivable issue arising between management and labor. "The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220, 13 L. Ed. 2d 233, 85 S. Ct. 398 . . . (1964) (Stewart, J., concurring).

NLRB v. Plymouth Stamping Div., Eltec Corp., 870 F.2d 1112, 1115 (6th Cir. 1989).

None of the cases cited by the Board involves a contractual right to subcontract, which is the distinguishable feature in this controversy. We believe the Board was in error in requiring the employer to renegotiate or bargain over a part of the agreed-upon collective bargaining agreement.

Accordingly, we refuse enforcement of the Board's Order on the issue of Petitioners' duty to bargain.

IV.

Under section 8(a)(1) and (3) of the Act, it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

The initial burden of establishing a section 8(a)(3) violation is on the Board. *NLRB v. Kentucky May Coal Co.*, 89 F.3d 1235, 1241 (6th Cir. 1996). Once the Board demonstrates that Petitioners' anti-union animus contributed to the employee's discharge, the burden shifts to the employer to prove by a preponderance of the evidence that there were independent, legitimate reasons for the decision and that the adverse action would have occurred in any event for those reasons. *Turnbull Cone Baking Co. of Tenn. v. NLRB*, 778 F.2d 292, 296 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159, 90 L. Ed. 2d 720, 106 S. Ct. 2277 (1986).

The Board in the present case found the benefits expected to result from the Neutral Plan -- gaining control of labor costs, eliminating labor negotiations, eliminating costs associated with union grievances, and allowing Automatic to become competitive against non-union contractors -- to be direct evidence that Petitioners' actions of subcontracting unit work and discharging unit employees were motivated by anti-union animus. Petitioners also expected the Neutral Plan to result in the reduction of vehicle costs, the elimination of road tool

costs, and entrance into the residential market. Those are legitimate reasons for the decision to adopt the Plan as is the desire to fundamentally change the nature of Automatic's base business from construction to service. In spite of that evidence, however, the ALJ found that Petitioners failed to carry the burden of proving by a preponderance of the evidence that the adverse action would have occurred in the absence of union representation of their employees.

Regardless of whether Petitioners have met their burden, their actions were justified under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that Petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is legally erroneous. *See Ironton Publications, Inc. v. NLRB*, 73 F.3d 362 (Table), 1995 WL 758448, at *5, *6 (6th Cir. 1995) (unpublished) (holding legally erroneous a Board's determination that a company discriminated against an employee in violation of section 8(a)(1) and (3) of the Act when, after learning that he had become a union member, the company began to pay the employee according to the terms of the collective bargaining agreement).

Therefore, we also deny enforcement of the Board's order on the issue of Petitioners' discrimination against the unions.

V.

The Order of the Board is VACATED and the Board's petition to enforce its Order is DENIED.

RYAN, Circuit Judge, concurring in part and dissenting in part.

I.

While I agree entirely with the conclusion reached in part

III. of the majority opinion holding that the Board erred "in requiring the employer to renegotiate or bargain" over the employer's decision to subcontract installation, maintenance, and repair work, as permitted by the collective bargaining agreement, I do not agree with some of my brother's reasoning in reaching that conclusion. Specifically, I do not agree with the all-important statement in part III. of my brother's opinion:

> While parties have a continuing duty to bargain in good faith after the *expiration* of a collective bargaining agreement, there is no such duty at the agreement's *termination*. Thus, when the collective bargaining agreements between Petitioners and the unions with 9(a) bargaining status terminated, rather than merely expired, upon their respective expiration dates, and because the agreements did not provide otherwise, Petitioners were relinquished of any contractual or statutory obligations to the unions. (Emphasis added.)

To me, there is no meaningful distinction between the "expiration" of the collective bargaining agreement and its "termination" *in the context of this case*. And, while there was no duty to bargain over "Automatic"'s decision to subcontract to unionized workers the maintenance, repair, and installation work it formerly did in-house, the absence of the duty arises from the terms of the collective bargaining agreement, and not from any supposed distinction between the "expiration" of the agreement and its "termination."

II.

More importantly, I have serious disagreement with the analysis and the conclusion reached in part IV. of the majority opinion. In that part of the opinion, the majority rejects the conclusion of the NLRB that "Automatic" is guilty of a violation of section 8(a)(3) for having committed an unfair labor practice "by discriminating in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). In that conclusion, I think my colleagues are mistaken.

While I have considerable doubt that the NLRB correctly concluded that "Respondent violated section 8(a)(3) of the Act by subcontracting the unit work and *discriminatorily* laying off the unit employees," (emphasis added), I have no doubt whatever that this court has no authority to vacate that decision. It has none because our standard of review is whether there is substantial evidence in the record to support the finding that "Automatic"'s decision to subcontract its installation, maintenance, and repair work--a decision permitted by the collective bargaining agreement if not done discriminatorily--was, in fact, "motivated by antiunion animus" with the "ultimate intent" of ridding the company of a unionized workforce.

The ALJ reached that conclusion in the course of a 41-page, single-spaced written opinion which developed, in very considerable detail, the ALJ's basis for crediting the testimony of the union's witnesses, and discrediting the testimony of the employer's witnesses. And, while I have considerable doubt whether, had I been the statutorily designated fact finder, I would have made the credibility determinations the ALJ did, I have no doubt that, given his assessment of the credibility of the witnesses, there is substantial evidence justifying the conclusion that the employer's subcontracting decision was, in fact, discriminatory, and not, as the ALJ put it, for the "pure as driven snow" reasons claimed by the employer.

There can be no question that "Automatic" did not commit an unfair labor practice under section 8(a)(3) simply by exercising its right guaranteed in the collective bargaining agreement to subcontract installation, repair, and maintenance work to unionized workers, and to eliminate that work in-house. Only if that action is taken with a "discriminatory intent," and for a purpose proscribed by section 8(a)(3), would

the otherwise unassailable business decision become an unfair labor practice, and that, according to the ALJ and the Board, is precisely what happened. The otherwise neutral act of subcontracting, as permitted by the collective bargaining agreement, became an unfair labor practice, because it was, according to the ALJ, a carefully orchestrated, ill-concealed, two-stage program motivated, primarily, by union animus, and designed to rid the company of the financial burden of a unionized workforce. In support of that conclusion, the ALJ found, *inter alia*:

> ["Automatic"'s] conduct was motivated by antiunion animus and violated Section 8(3) of the Act with respect to *all* of the affected employees represented by *all* the Charging Unions, whether represented pursuant to a Sec. 9(a) or 8(f) arrangement.

Additionally,

> Pro-Forma III-A in its first three pages is far more revealing concerning ["Automatic"'s] intentions. . . .
>
> This change will provide us [("Automatic")] the following benefits:
>
> Gain control of labor costs on projects[;]
>
> Minimizes the risk potential for labor cost overruns on contracts [;]
>
> Not signatory to any union contract, its pay demands and its work rules[;]
>
> Eliminate labor negotiations[;]
>
> Eliminate costs associated with union grievances[;]

Further,

> Pro Forma III-A clearly demonstrates ["Automatic"'s] dislike of the restrictions imposed on it by union representation of its employees, and its desire to be a union-free employer. ["Automatic"] had contemplated

the possibility of going nonunion for some time prior to its adoption of the "Neutral" plan, and after some misgivings, took the plunge. . . . ["Automatic"] went to considerable pains to mislead the unions into believing that it was merely extending its subcontracting.

Also,

["Automatic"'s president] advised the local unions representing ["Automatic"] sprinkler fitters of [the company's] withdrawal from NFSA, and sent the following message to [the company's] district managers:

> . . . .
> I need each of you to contact the Business Agent in your area and ask to sit down with them to discuss this change. . . .
> Here is why we withdrew:
> . . . .
> *Union Relationship* - This will force us to work directly with the local unions for the benefit of both. We are not planning to be a non-union contractor. . . .

And,

["Automatic"'s] concealment commenced with its notice to NFSA that it intended to bargain individually with the Unions, continued with its reassurances to Simpson that there would be contractual relationships . . . in the future[.] . . . That announcement itself was designed to mislead the Unions. It invited bargaining on [the company's] decision to no longer employ the Locals' members, but the record clearly shows [the company] had no intention of bargaining on its decision.

And,

> ["Automatic"'s] primary concern was to increase its share of the fire protection market by being free from the unions' collective-bargaining agreements' restrictions on subcontracting which forbade [the company] to subcontract to nonunion firms, and, being thus freed, [the company] would penetrate the market share held by nonunion firms because it could then subcontract to the lowest bidder, union or nonunion.

Finally,

> Respondent's conduct in terminating its union member employees, severing its relationships with the contracting unions, turning toward nonunion subcontracting, and concealing its ultimate plan from the Unions violated Section 8(a)(3) and (1) of the Act.

My brother's opinion does not take issue with these findings by the ALJ and their adoption by the Board. Nor does it assert that the Board erred in performing the burden-shifting analysis required in so-called "dual-motive" cases such as this. *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1291 (6th Cir. 1997).

With regard to the required burden-shifting and "dual-motive" cases, the ALJ wrote:

> Furthermore, General Counsel has shown that the desire to rid itself of the Local Unions, thereby discouraging union activity, was at the very least one of the motivating factors in ["Automatic"'s] decision to become a general contractor and subcontract all its sprinkler installation work. ["Automatic"] therefore is obliged to show by a preponderance of the evidence it would have done so in the absence of union representation of its employees. *Wright Line*, 251 N.L.R.B. 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 76 L. Ed. 2d 667,

> 103 S. Ct. 2469 (1983). *Respondent has not carried this burden.*

(Emphasis added.) The ALJ expressly considered and rejected the proffered legitimate business reasons for "Automatic"'s decision. Nevertheless, my brother writes, "["Automatic"'s] actions were justified under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that Petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is legally erroneous." But that observation begs the question, which is, whether "Automatic"'s actions were, indeed, taken "under the subcontracting provisions of the parties' collective bargaining agreement" or were taken for the forbidden discriminatory reason of anti-union animus aimed at simply ridding the employer of the financial burdens of a portion of its unionized workforce. The Board, in adopting the extensive analysis, findings, and conclusions of the ALJ, as well as the credibility determinations by the ALJ, found that the subcontracting decision was not taken "under the subcontracting provisions of the parties' collective bargaining agreement," but, given "Automatic"'s motive, was made in violation of section 8(a)(3).

III.

For these reasons, I respectfully dissent from part IV. of my colleague's opinion and concur in the conclusion reached in part III.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos.: 95-6599: 96-5159

"AUTOMATIC" SPRINKLER CORPORATION
OF AMERICA, ET AL.,
Petitioners/Cross-Respondents,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.,
AFL-CIO,
Intervenor.

Filed October 31, 1997

Before WELLFORD, RYAN, and SILER, Circuit Judges.

ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the

case. Accordingly, the petitions are denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos.: 95-6599: 96-5159

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA;
FIGGIE INTERNATIONAL, INC.,
Petitioners/Cross-Respondents,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.,
AFL-CIO,
Intervenor.

Issued as Mandate November 14, 1997

Before WELLFORD, RYAN, and SILER, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon a petition for review and cross-application for enforcement of an order against "Automatic" Sprinkler Corporation of America and Figgie International, Inc.

UPON FULL REVIEW of the record and the briefs and arguments of counsel, we conclude that the decision of the Board should not be enforced, and accordingly:

IT IS ORDERED that the order issued by the Board in this

matter be vacated. IT IS FURTHER ORDERED that the petition by National Labor Relations Board to enforce its Order is DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX D

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND ROAD SPRINKLER FITTERS LOCAL UNION NO. 669 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND PIPE FITTERS LOCAL UNION NO. 120 OF CLEVELAND, OHIO, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND ROAD SPRINKLER FITTERS LOCAL UNION NO. 692 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION 536

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT

EMPLOYER AND SPRINKLER FITTERS LOCAL UNION NO. 542, AFFILIATED WITH UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES UNION LOCAL NO. 281, AFFILIATED WITH UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES LOCAL UNION 314

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES LOCAL UNION NO. 699, UA, AFL-CIO

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS LOCAL UNION NO. 696 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES

LOCAL UNION NO. 483 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS LOCAL UNION 676, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS LOCAL UNION NO. 709 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA.

Cases 8-CA-26201, 8-CA-26471, 8-CA-26333, 8-CA-26454-1 (formerly 4-CA-22747), 8-CA-26454-2 (formerly 5-CA-24283), 8-CA-26454-3 (formerly 6-CA-26399), 8-CA-26454-4 (formerly 13-CA-32462), 8-CA-26454-5 (formerly 17-CA-17319), 8-CA-26454-6 (formerly 19-CA-23298), 8-CA-26454-7 (formerly 19-CA-19870), 8-CA-26454-8 (formerly 2-CA-13389), 8-CA-26454-9 (formerly 34-CA-6556), and 8-CA-26454-10 (formerly 21-CA-30069).

October 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On December 30, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception, and the General Counsel and the Union each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We also agree with the judge that restoration of the Respondent's sprinkler fitting operations is an appropriate remedy based on the Respondent's unlawful subcontracting of the work that employees represented by the 12 Local Unions formerly performed. Although the judge noted, at fn. 13 of his decision, that the Respondent may introduce evidence at the compliance stage of this case to demonstrate that restoration of these operations is unduly burdensome, we find merit in the General Counsel's and the Union's argument that the judge erred by failing to

The date that the Respondent originally planned to complete the subcontracting of all sprinkler fitter labor work at sec. IV, A, par. 5, of the judge's decision should be August 31, 1995.

We adopt the judge's finding that the Respondent violated Section 8(a)(3) of the Act by subcontracting the unit work and discriminatorily laying off the unit employees. In so concluding, we stress that in the Respondent's internal document containing the subcontracting plan titled "Pro Forma III-A" the Respondent stated that it expected to gain, inter alia, the following benefits from its subcontracting decision:

> Gain *control* of labor costs [emphasis in original] . . . Eliminate labor negotiations; Eliminate costs associated with union grievances . . . Allow "Automatic" to become competitive against nonunion contractors.

Thus, there is direct evidence here showing that the Respondent's decision to subcontract the unit work was discriminatorily motivated as it sought to rid itself of union-represented employees. Regarding Locals 120, 542, 676, and 696 that had 8(f) bargaining status,[3] we specifically note that the Respondent's collective-bargaining agreements with these Locals had varying expiration dates and that, in each case,

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provide that the Respondent can only present previously unavailable evidence in order to make this showing in compliance. See *Compu-Net Communications*, 315 N.L.R.B. 216 fn. 3 (1994). We will modify the judge's order and notice. In so doing, we note that the Respondent chose not to litigate the restoration issue before the judge at the unfair labor practice hearing.

[3]The other eight Locals with which the Respondent had a bargaining relationship, as discussed below, enjoyed 9(a) status.

the agreements had not yet expired before the Respondent discharged the unit employees. Because the Respondent clearly was obligated under *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S. Ct. 222 (1988), to honor the terms of these 8(f) agreements until they expired, we find that the Respondent acted unlawfully in terminating these unit employees for antiunion considerations before expiration.[4]

We also agree with the judge that the Respondent violated Section 8(a)(5) by refusing to bargain with those eight Locals that had 9(a) bargaining status about the decision to subcontract unit work and the effects of that decision, as well as over successor collective-bargaining agreements.[5] It is clear that the Respondent's subcontracting decision was a mandatory subject of bargaining under *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 214 (1964), because the Respondent in effect substituted the subcontractors' employees for its own. The record discloses that the Respondent continues to install and maintain sprinkler systems and that labor costs, which the Local Unions had substantial authority to control, constituted the principal basis for the Respondent's subcontracting decision.[6] Furthermore, as the judge found, the Respondent did

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[4]We find that, in any event, an employer cannot discriminatorily terminate employees, even after an 8(f) contract expires. The expiration of an 8(f) contract simply privileges a withdrawal of recognition, not a discriminatory discharge of employees.

[5]Member Cohen agrees that the subcontracting violated Sec. 8(a)(3), and therefore finds it unnecessary to pass on whether that subcontracting also violated Sec. 8(a)(5) of the Act.

[6] Thus, the present case is clearly distinguishable from *Oklahoma Fixture Co.*, 314 N.L.R.B. 958, 959-960 (1994), in which the

not bargain in good faith over this mandatory subject of bargaining as it presented the Local Unions with a fait accompli and then sought to have them engage in the futile act of bargaining about that decision. Yet, the most compelling proof of the Respondent's bad-faith bargaining in this case is our finding above that the subcontracting decision was discriminatorily motivated. The Board has consistently held that an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise. See, e.g., *Equitable Resources Exploration*, 307 N.L.R.B. 730, 732-733 fn. 11 (1992).[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, "Automatic" Sprinkler Corporation of America and Figgie International Inc., a single or joint employer, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in

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Board found that the employer had no duty to bargain about its decision to subcontract electrical work as the employer had legitimate concerns about its legal liability and the risk of losing customers if the work was improperly done. Because labor costs were not a factor in that employer's decision to subcontract such work, the Board concluded that the subcontracting decision there, unlike in this case, involved considerations of corporate strategy fundamental to preservation of the enterprise that were outside the scope of mandatory bargaining.

[7]In the absence of exceptions, we do not pass on whether the Respondent further violated Sec. 8(a)(5) by terminating the unit employees represented by the four 8(f) Locals before any of their collective-bargaining agreements expired.

the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Reinstate the subcontracted operations that employees represented by Locals 669, 120, 692, 536, 542, 281, 314, 699, 696, 483, 676, and 709, formerly performed, unless it is shown at the compliance stage of this proceeding that it is unduly burdensome to reinstate those operations.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 25, 1995, William B. Gould IV, Chairman, Charles I. Cohen, Member and John C. Truesdale, Member.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate employees in order to engage in nonunion subcontracting.

WE WILL NOT unilaterally subcontract bargaining unit work.

WE WILL NOT refuse to bargain with Local Unions 669, 692, 536, 281, 314, 699, 483, and 709 United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO concerning our decision and the effects thereof of subcontracting all work performed by employees represented by those Unions.

WE WILL NOT refuse to bargain with Local Unions 669, 692, 536, 281, 314, 699, 483, and 708 concerning successor collective-bargaining agreements.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the subcontracted operations that employees represented by Locals 669, 120, 692, 536, 542, 281, 314, 699, 696, 483, 676, and 709 formerly performed, unless it is shown at the compliance stage of this proceeding that it is unduly burdensome to reinstate those operations.

WE WILL offer reinstatement to all employees who were terminated as a result of our unlawful subcontracting and WE WILL make them whole for any loss of earnings they suffered by reason of that unlawful termination, with interest.

WE WILL, on request, bargain with Local Unions 669, 692, 536, 281, 314, 699, 483, and 709 concerning the decision to subcontract and its effects on employees, and for successor collective-bargaining agreements.

WE WILL, on request, furnish Local 669 with information previously requested and relevant and reasonably necessary to its function as a collective-bargaining representative of our

sprinkler fitter employees.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC.

* * * *

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated case was litigated before me in Cleveland, Ohio, on 12 days in September and October 1994 pursuant to charges filed and[1] served and a second amended consolidated

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[1]The charges and amended charges in this proceeding were filed and served on the dates set forth below after the designation of the local union of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fining Industry of the United States and Canada, AFL-CIO (United Association) which filed them. The case numbers (Case) in parentheses are the case numbers originally assigned to those charges.

Case	*Local*	*Filing date*	*Service date*	*Type of charge*
8-CA-26201	669	3-4-94	3-7-94	initial
8-CA-26471	669	6-21-94	6-22-94	initial
8-CA-26333	120	4-28-94	4-29-94	initial
8-CA-26454-1 (4-CA-22747)	692	5-13-94	5-13-94	initial
8-CA-26454-2 (5-CA-24283)	536	3-15-94	3-18-94	initial
. . .		5-4-94	5-9-94	amended
8-CA-26454-3	542	5-10-94	5-10-94	initial

complaint issued on August 12, 1994. The General Counsel alleges "Automatic" Sprinkler Corporation of America (ASCOA) and Figgie International Inc. (Figgie) (jointly refereed to as the Respondent) are a single employer or joint employers who have violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act by constructing and implementing a plan to subcontract all work performed by employees represented by the Unions involved herein without giving the Unions prior notice or opportunity to bargain on this decision and its effects, all in order to discourage union membership, and by refusing to furnish Locals 669 and 699 with certain information to which they were entitled. The

Case	*Local*	*Filing date*	*Service date*	*Type of charge*
(6-CA-26399)			6-16-94	
. . .		6-16-94	6-16-94	amended
8-CA-26454-4	281	4-26-94	5-3-94	initial
(13-CA-32462)				
. . .		5-26-94	6-9-94	amended
8-CA-26454-5	314	4-7-94	4-7-94	initial
(17-CA-17319)				
8-CA-26454-6	699	3-29-94	3-29-94	initial
(19-CA-23298)				
8-CA-26454-7	696	5-10-94	5-11-94	initial
(22-CA-19870)				
8-CA-26454-8	483	8-18-93	8-18-93	initial
(32-CA-13389)				
. . .		4-8-94	4-8-94	amended
8-CA-26454-9	676	4-8-94	4-8-94	initial
(34-CA-6556)				
. . .		5-10-94	5-11-94	1st amended
. . .		5-17-94	5-19-94	2d amended
8-CA-26454-10	709	5-18-94	5-19-94	initial
(21-CA-30069)				

Respondent denies it has violated the Act and proffers certain affirmative defenses.

On the entire record, and after carefully considering the demeanor of the witnesses and the very able posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. BUSINESS OF ASCOA AND FIGGIE

ASCOA is a division of Figgie, an Ohio corporation, with an office and place of business in Cleveland, Ohio, and has been engaged, among other things, in the installation, repair, maintenance, and service of fire sprinkler systems (sprinkler fitter work). During the 12 months preceding the issuance of the second amended consolidated complaint, ASCOA, in the course and conduct of its business operations, purchased and received goods and services valued in excess of $ 50,000 directly from suppliers located outside the State of Ohio. At all times material to this proceeding, Figgie has been and is a corporation, and ASCOA and American La France are divisions of the Figgie corporation. Although ASCOA has its own offices, management, and Supervision, ASCOA provides services for and makes sales to Figgie and other divisions of Figgie, and maintains its own personnel, all of which both ASCOA and Figgie concede to be the case, the record clearly shows that, although ASCOA preliminarily formulates and administers its own business practices and labor policy, that formulation and administration is subject to the approval of directors and officers of Figgie, who annually convene with ASCOA officers to jointly formulate policies and practices as they did with the decision to subcontract all of ASCOA's sprinkler installation work that is at issue in this proceeding.

Moreover, the assertion, which is uncontradicted by probative evidence, by ASCOA and Figgie in their answer to the second amended complaint that ASCOA has no separate ownership or directors is, in my view, a concession that Figgie controls the policies and practices of ASCOA. This is consistent with Figgie's June 30, 1994 quarterly report to the Securities and Exchange Commission, which is a consolidated report of Figgie and its subsidiaries. In sum, Figgie and ASCOA are a single-integrated business enterprise controlled by Figgie. The complaint alleges, Respondent in its answer admits, and I find that Figgie and ASCOA have been, at all times material to this proceeding, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

At all times material, Local Unions 669, 120, 692, 536, 542, 281, 314, 699, 696, 483, 676, and 709 (coliectively called the Local Unions or individually referred to by their number) have been labor organizations within the meaning of Section 2(5) of the Act.

All but Locals 120, 542, 676, and 696 enjoy the representative status described in Section 9(a) of the Act as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

Locals 120, 542, 676, and 696 were parties to agreements with Respondent entered into pursuant to Section 8(f) of the Act, which reads in relevant part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act, as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act to the making of such agreement.

III. SUPERVISORS AND AGENTS

At all times material to this proceeding, except as specifically noted, the following named individuals held the positions set forth opposite their names and have been supervisors for Figgie or ASCOA within the meaning of Section 2(11) of the Act and agents for Figgie or ASCOA within the meaning of Section 2(13) of the Act as specifically designated opposite their names:

Harry Figgie, Jr.	Chairman and CEO, Figgie International to 5-18-94
David R. Gross	Manager/Employee Relations, Figgie International Inc.
James Nelson	Manager, Employee Benefits, Figgie International Inc.

Owen G. Stout	President, ASCOA
John J. Gullo, Jr.	Director Human Resources, ASCOA
Richard Douglass	Operations Manager, ASCOA Cleveland Hub
Arthur D. O'Neill	Operations Manager, ASCOA Baltimore Hub since 7-1-93
Phil Skufis	Sales Manager, ASCOA Baltimore Hub
Richard Butts	Manager, ASCOA Kansas City Hub
H. Ray Wilkerson	Operations Manager, ASCOA Cleveland Hub until 1-16-94 District Service Manager, ASCOA Youngstown thereafter
William Wales	Project Manager, ASCOA Baltimore Hub
Wade Sylvester	Sales Manager, ASCOA Cleveland Hub to 1-1-94 District Manager, ASCOA Detroit thereafter
Allen C. Sands	Project Manager, ASCOA
Donald Maupin	District Service Supervisor, ASCOA Louisville
Tony Iannarelli	District Service Supervisor, ASCOA Boston until 6-30-94
Michael May	Regional Superintendent until 7-1-93, Operations Manager, ASCOA Los Angeles Hub thereafter
Roy Comer	Contract Representative, ASCOA Los Angeles Hub from 7-1-93 to 9-3-93
Dwight Bickler	District Service Supervisor,

	ASCOA Kent, Washington, from 7-1-93 to 2-11-94
Rick Waldo	District Service Supervisor, ASCOA Kent, Washington, since 3-16-94
Keith Millard	District Service Representative, ASCOA Kent, Washington, from 11-1-93 to 2-18-94
Larry Goeckner	Superintendent, ASCOA Los Angeles Hub until 9-1-93, thereafter Project Manager, ASCOA Los Angeles Hub
Len Bass	Service Manager, ASCOA Los Angeles Hub

IV. THE ALLEGED UNFAIR LABOR PRACTICES[2]

A. *The Change in Operations*

The Respondent had successive collective-bargaining agreements covering its sprinkler fitter employees who were members of the charging Locals and other local unions of the United Association for many years until the agreements were terminated in the course of the 1992-1994 events presently before me. These agreements were between the charging Locals and local unions and the National Fire Sprinkler Association

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[2]The facts here found are the result of a synthesis of the credited portions of the testimony, the exhibits, stipulations, and consideration of logical consistency and inherent probability. Although I will not in the course of this decision advert to all of the record testimony or documentary evidence, it has been weighed and considered. To the extent that testimony or other evidence not mentioned might appear to weigh against the findings of fact, that evidence has not been disregarded but has been rejected as incredible, lacking in probative worth, surplusage, or irrelevant.

(NFSA), a multiemployer bargaining association who bargained with the unions on behalf of Respondent and its other employer members signatory to the NFSA contract.

Respondent's sprinkler fitter employees were primarily engaged in the installation, alteration, maintenance, repair, and service of fire control systems manufactured and sold by ASCOA. These employees also performed inspection work and made efforts to sell ASCOA's products and related services.

It is Respondent's practice to hold annual meetings chaired by Figgie officers and participated in by officers and other representatives of Figgie and ASCOA for the purpose of reviewing past company performances and planning action for the future. These deliberations result in "Hardcore" plans, which are in fact 5-year budget projection plans modified, updated, and extended yearly. Such a meeting was held in November 1992. The participants, Figgie's and ASCOA's officers and representatives, agreed to a plan (the Neutral Plan) earlier developed by Owen Stout, ASCOA's president, which provided ASCOA would become a general contractor and would subcontract out all sprinkler fitter work after its current collective-bargaining agreements with the locals unions representing its sprinkler fitters expired. Stout testified the transition to general contractor status and the elimination of direct employment of sprinkler fitters should result in various benefits, including the elimination of negotiations with unions and the cost of grievances, the reduction of administrative labor costs, and the minimization of excessive labor costs on some contracts.

According to Michael Siedler, ASCOA's controller, it was calculated that the subcontracting of the sprinkler fitter work would result in a gross savings of about $ 3.7 million per year,

which would be derived from the freedom from paying fringe benefits to the sprinkler fitters, a saving on leased vehicles of 45 percent, a saving of about $ 158,000 on road tools, and a reduction in administrative costs, His calculations did not include the estimation of savings from reduced labor rates. Siedler concedes, however, that no such analysis was presented or discussed at the 1992 Hardcore meeting, and the figures he recites, which include 1993, were but recently developed by him.

Respondent decided at the November 1992 meeting that its plan to be a general contractor would become effective in January 1993 and subcontracting of all sprinkler fitter labor work would be completed by August 31, 1994.

Although Respondent dubbed this new program the "Neutral Plan," it would appear from the testimony of Respondent's witnesses, notably President Stout, that Respondent's primary concern was to increase its share of the fire protection market by being free from the unions' collective-bargaining agreements' restrictions on subcontracting that forbade Respondent to subcontract to nonunion firms, and, being thus freed, Respondent would penetrate the market share held by nonunion firms because it could then subcontract to the lowest bidder, union or nonunion, Respondent's officials had discussed the possibility of becoming a nonunion company in prior years, but had taken no steps to do so. Here they did.

Respondent's documents titled "Pro Forma III-A, B, and C," prepared after the 1992 Hardcore meeting, which describe its plans for 1993 and thereafter, set forth the opening of 22 new service locations to take place on the expiration of its labor contracts, and specifically notes in Pro Forma III-B that 11 of these locations "will open as Neutral (nonunion) operations."

Pro Forma III-A in its first three pages is far more revealing concerning Respondent's intentions. Those pages are set forth below:

PRO FORMA III-A NEUTRAL OPERATIONS

PROJECT DESCRIPTION

A project with the goal of modifying "Automatic" Sprinklers approach to providing for the labor content of its contracting business thereby positioning "Automatic" as a leading fire protection general contractor servicing both union and non-union markets within the fire protection industry at the expiration of the current union contract agreements.

We must carry out this modification in such a manner so as to prevent labor union problems during the transition in order to maintain profitable market share of the union fire protection market.

This change will provide us the following benefits:

Gain control of labor costs on projects

Minimizes the risk potential for labor cost overruns on contracts

Not signatory to any union contract, its pay demands and its work rules

Eliminate labor negotiations Eliminate costs associated with union grievances

Passes workers compensation and salary costs attributable to direct hire of labor force to subcontractor

Reduce vehicle costs

Eliminate road tool costs

Reduce Broadview Heights administration costs associated with union labor

Allow "Automatic" to bid both union and nonunion projects

. . .

Allow "Automatic" to become competitive against non-union contractors

Gives more focus on extras on each project

Entrance into residential market

Execution of this plan must be done with caution so as not to violate any term of existing union contracts and so as not to cause a work slow down by the union labor force on contracts in progress.

"Automatic" will change its method of doing business from one of a fire protection contractor providing its own labor force to that of a fire protection general contractor whereby the labor requirements for contracts sold will be fulfilled through subcontractors who are either union or nonunion as required.

"Automatic" is signatory to 20 labor union contracts with the last one expiring 8/31/95.

Puerto Rico Local 669/821 not addressed as the union is possibly withdrawing from island. Existing contract has been extended to 12/31/92.

The neutral plan will be implemented as follows:

"Automatic" will change its focus on labor procurement beginning 1/4/93 to meet our goal of neutral operations.

Notify individual unions and NFSA as appropriate of our intentions not to renew the contract.

Seek out quotations for sub-contract labor from small union sprinkler companies for all new contract bids beginning 1/4/93.

Identify "company-oriented" fitters who might set up union installation companies if "Automatic" will assist with set up

No new contracts to be performed with in-house

fitters after labor contract expiration dates.
If current backlog completion date exceeds labor contract expiration--subcontract balance to new installation company

This plan will be completed on 8/31/95 as the last contract expires.

At this point, "Automatic" can operate in all parts of the United States as a non-union contractor in areas where we can't compete now because of our union affiliation.

"Automatic" could continue to subcontract to union labor companies on the jobs required.

The total domestic sprinkler market is approximately $ 4.8 billion.

The union segment is $ 2.2 billion and the non-union segment is $ 2.6 billion.

As a neutral contractor (general contractor), "Automatic" can participate competitively in the total fire protection market This is the way to grow the company.

We expect to almost double our contract volume by 1997.

To do this we must restructure our organization to put more sales personnel into the new areas when we become neutral (non-union areas).

We will begin this re-structuring in 1994 to be in place by 1/1/95. Expediting this would interfere with the efforts necessary to put the main ingredient of this plan in motion-developing sources to subcontract the labor.

By letter of February 10, 1993, Stout timely withdrew ASCOA's membership in NFSA. The following day, February

11, 1993, Stout advised the local unions representing ASCOA sprinkler fitters of ASCOA's withdrawal from NFSA, and sent the following message to ASCOA's district managers:

> By now you know that we withdrew from the NFSA.
>
> The attached letter has been sent to the local unions to notify them of our action.
>
> I need each of you to contact the Business Agent in your area and ask to sit down with them to discuss this change. Don't wait for them to call you.
>
> Here is why we withdrew:
>
> Economics--We feel we can better utilize our money and efforts to grow our business.
>
> Growth--We feel the NFSA is not in tune with how bad the industry really is. We will be out of business unless we grow. NFSA membership limits our potential for this.
>
> Control--We want to control as much of our future as we can and not be me-too contractor.
>
> Union Relationship--This will force us to work directly with the local unions for the benefit of both. We are not planning to be a non-union contractor.
>
> Please limit your discussions to these topics. Anything else is risky and could be harmful to "Automatic."

Thereafter, Respondent increased its subcontracting but apparently restricted it to union employers signatory to the unions' collective-bargaining agreements with NFSA as required by that (the NFSA) agreement, to which the charging Locals and other unions are signatory. Respondent took pains to advise union representatives it was not going to sub contract to nonunion employers. For example, Respondent ASCOA's

president Stout, in a March 1993 confidential memo to ASCOA's district managers related that he had told then Local 669 business manager Harold Simpson "We will subcontract/joint venture with only union companies. We do not plan to use non-union. We will work to the letter of our contracts." Simpson agrees that Stout so advised him, and credibly adds that Stout emphasized Respondent would be signatory to a union agreement in future years. Simpson recalls in an article for the May 1993 edition of the Local 669 newsletter that "the company has also informed us that it may go out of the installation business altogether. Whatever "'Automatics' true plan, we must be ever vigilant and aggressively defend our work." This quotation does not establish Local 669 then knew Respondent had decided to sub contract all installation work and no longer employ persons represented by Local 669 for Respondent's sprinkler fitter labor requirements. Respondent's testimony from Stout and Gullo and the content of the Pro Formas shows it was Respondent's plan to subcontract to unionized companies only when necessary.

Respondent notified each Local Union as its contract expired. Thereafter, the exchanges between the Charging Locals and Respondent varied.

Local 669

Respondent sent the following letter to Local 669 on January 28, 1994:

> This is to serve notice that "Automatic" Sprinkler Corporation of America intends to terminate the Agreement presently in effect between it and your Union, effective with the termination dated March 31,

1994. You are further notified that "Automatic" Sprinkler Corporation of America has made a good-faith business decision to permanently and unequivocally alter the basic direction of its business whereby it will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair and service of the "Automatic["] Sprinkler fire control Systems. It is the intention of "Automatic" Sprinkler Corporation of America to implement that fundamental change in its business effective April 1, 1994. In the event that you desire to discuss this business decision and the effects thereof on members of your Union who are or were employed by "Automatic" Sprinkler Corporation of America, please give me a call. You may be assured the Company will negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Local 669 responded by letter of February 7, 1994 as follows:

Dear Mr. Stout:

In light of your letter of January 28, 1994, this is a request for information on behalf of Local 669 regarding certain business decisions that "Automatic" (or its parent company) has, or may have made which would vitally affect bargaining unit members represented by Local 669:

1. If "Automatic" has made any company-wide or district-wide decision(s) to permanently subcontract or otherwise transfer some or all of its operations as of a certain date, what specific decision was made, when was the decision made, why was it made, and by

whom? If Local 669 was given any official notice of this decision, please forward us a copy of the notice. Did "Automatic" offer to bargain with the Union regarding either the decision or its effects upon unit employees? If so, please describe when such offer was made.

2. If "Automatic" made decision(s) to lay off a portion of the Local 669 bargaining unit, or, for that matter, the entire unit, please advise as to when the decision was made, and why it was made, Prior to January 28, 1994, was Local 669 given notice of and/or an opportunity to bargain with "Automatic" about this decision and/or its effect?

3. Has "Automatic" determined to close all or part of its installation operation at some time in the future? If so, when was the decision made and when does "Automatic" intend to close its installation operations? When was Local 669 notified? Did "Automatic" offer to bargain?

4. Please forward to this office the following documentary information:

--any and all subcontract agreements, or joint venture agreements, or any other contracts or agreements by "Automatic" (and/or its parent) covering, in whole or in part, the transfer of, subcontracting joint venturing or sharing of bargaining unit work as described in Article 18 of our agreement;

--corporate resolutions or other "Automatic" business records indicating when the decisions discussed in paragraphs 1-3 above were made, and the reason(s) why they were made; and

--any Company records indicating the potential effect upon unit employees of these decisions or

any projected studies of cost savings to the Company as a consequence of some or all of these decisions.

We need this information within fourteen (14) days. The Union's legitimate need for this information should be obvious. Without it, we can not protect unit employees from the effects of adverse business decisions by "Automatic." The information will also be useful to Local 669 for negotiation of a new agreement, effective April 1, 1994.

To the extent that "Automatic" has made some or all of the decisions discussed above, this letter will also constitute a demand that "Automatic" cease and desist from this conduct immediately and make whole affected unit employees, as well as a demand by the Union to bargain about the decision(s) and their effects upon represented employees.

Respondent replied to Local 669 on February 15, 1994, by letter as follows, in pertinent part:

As stated in our letter to you dated January 28, 1994, "Automatic" Sprinkler has made a good faith business decision to permanently and unequivocally alter the basic direction of our business whereby we will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair or service of automatic fire control systems.

In our letter dated January 28, 1994, we offered to negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Your February 7th correspondence requested the answers to certain specific questions with regard to the

Company's decision and seeks certain documents. I have prepared a draft response and am attempting to gather documents responsive to your request. Our legal counsel was tied up in negotiations last week out of town when I received your request and is out of the country until next week. I will ask him to review your request upon his return to the office to assist the Company in complying with its bargaining obligations. Therefor, I wanted to inform you that the company will respond to your request as expeditiously as possible upon the return of our counsel.

This reply was followed by another letter from Respondent to Local 669 dated March 8, 1994, reading:

Following is a reply to your letter dated February 7, 1994.

As stated in our letter to you dated January 28, 1994, "Automatic" Sprinkler has made a good faith business decision to has made a good faith business decision to permanently and unequivocally alter the basic direction of our business whereby we will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair or service of automatic fire control systems.

We will subcontract the labor needed to conduct the installation, alteration, maintenance, repair or service of automatic fire control systems to a contractor that has a collective bargaining agreement your Union, per Article 18 of the current collective bargaining agreement.

In our letter to you dated January 28, 1994, we offered to negotiate in good faith with you concerning this business decision and its effects on those

employees affected by the decision.

In approximately the Fall of 1992, we began to reexamine our manner of conducting business in the hopes of making the enterprise more competitive and thus more profitable. "Automatic's" President, Owen Stout ("Stout"), concluded that the Company's direction and operations had to change to make these goals possible. He concluded that it would be more cost efficient for "Automatic" to cease providing its own labor force, in favor of becoming a general contractor which would acquire the labor force required for its contracts through subcontractors. Stout believed that smaller sub contractors could be more competitive with their labor estimates. Stout, however, not wanting to alienate the Union nor wanting to violate the collective bargaining agreement, decided that the Company would sub contract only with construction companies that were parties or signatory to labor agreements. In order to implement this plan, the Company decided that it would have to withdraw from NFSA and, furthermore, that it would not renew all of its labor contracts with the various locals.

Stout discussed the Company's goals and the fundamental change in the Company's operations in early March 1993 with Vern Simpson, the Business Manager of Local 669 which was a party to a collective bargaining agreement with NFSA/"Automatic" covering sprinkler fitters throughout the Country wherever autonomous Locals of the Internationals, had no jurisdiction. A memorandum concerning this meeting which sets forth the Company's planned changes in operations was circulated to all of "Automatic's" District Managers on March 8, 1993.

"Automatic" took the first step in implementing this

new operating plan in early February 1993 when it formally withdrew from NFSA. In a memorandum to all District Managers dated February 11, 1993, Stout explained his reasons for the withdrawal (copy enclosed). Stout decided that the Company's withdrawal from NFSA would allow it to work more closely with the Locals and thereby prepare them for "Automatic's" upcoming changes in operations. Although "Automatic" would no longer be employing members of the Locals directly, it would be employing their members through subcontractors and therefore the Company desired a closer, mutually beneficial relationship with both the Locals and their members. "Automatic" has not rejoined NFSA since its withdrawal in February 1993.

During approximately this same period of time, "Automatic" began formatting its subcontracting procedures. The Company developed a "form" subcontract agreement to be used in the purchase of sprinkler fitter labor. The form agreement, among other things, required that the subcontractor be a party or signatory to a collective bargaining agreement. The contract also contained warranty, payment, insurance and liability provisions. The subcontract form, with attached documents, has come to be known as the "S Order" at "Automatic". The "S Order" was circulated to all of "Automatic's" District Managers on June 29, 1993 (copy enclosed).

In March 1993, "Automatic" began the next phase of its reorganization. In the period between March 31, 1993 and September 15, 1993, collective bargaining agreements between NFSA/"Automatic" and Local 183 in Milwaukee, Local 483 in San Francisco, Local 709 in Los Angeles and Local 550 in Boston expired. By

the time of the expiration dates of the contracts in those areas. "Automatic" had successfully transformed its operations in each area into that of a general contractor and, as a result, no longer employed members of these Locals. Instead, all of the Company's labor needs were provided for by union subcontractors with the end result being mutually beneficial: "Automatic" had successfully reorganized and union members did not lose any work.

Since May 20, 1993, "Automatic" has begun to bid all of its prospective contracts in Local 669's jurisdiction as a general contractor with the intention of subcontracting the labor requirements. Projects awarded to "Automatic" have already been or will soon be subcontracted by "Automatic" in accordance with the subcontracting provisions of the current agreement between it and Local 669.

"Automatic" has taken all steps necessary to changes its operations from that of being a direct employer of sprinkler fitters or other members of Local 669 to that of being a general contractor that subcontracts for its labor.

"Automatic" Sprinkler has not violated and is not violating any provision of the current collective bargaining agreement by subcontracting the labor on our projects. We will not cease and desist from implementing our business decision.

Enclosed and listed below are all documents that we deem relevant. There are no Corporate resolutions nor similar documents which reflect this decision making process.

02-05-93--Internal memo about withdrawal from NFSA.

02-10-93--Letter to NFSA about withdrawing

membership.

02-11-93--Letter to Figgie International concerning "Automatic's" withdrawal from NFSA.

02-11-93--Form letter that was sent to all unions (including 669) concerning "Automatic's" withdrawal from NFSA.

02-11-93--Memo to all District Managers advising them to meet with Business Agency to explain our business decision.

03-08-93--Memo to all District Managers concerning a meeting between "Automatic" and 669's Business Manager, Vern Simpson.

04-05-93--Letter to 669 members from Vern Simpson, Business Manager, Local 669.

04-23-93--Memo to Calfee, Halter, & Griswold about Labor Subcontracting.

05-26-93--Memo to all District Managers transmitting copy of Procedure 8-2 on Subcontracting Labor.

06-28-93--Procedure 8-2 rewritten and revised as Procedure 8-5, Subcontract Labor.

01-28-94--Letter to 669 concerning "Automatic's" business decision.

02-07-94--Letter from 669 responding to "Automatic's" 1-28-94 letter.

02-15-94--Letter to 669 with "Automatic's" response to 2-7-94 letter.

In the event that you desire to discuss this business decision and the effects thereof on members of your Union who are or were employed by "Automatic" Sprinkler Corporation of America, please give me a call. You may be assured the Company will negotiate in good faith with you concerning this business

decision and its effects on those employees affected by the decision.[3]

By letter of April 22, 1994, Local 669 requested Respondent to furnish, among other things, the information listed in the following questionnaire:

QUESTIONNAIRE

Please provide the following information for "Automatic" Sprinkler Corporation of America ("Automatic"), American LaFrance Fire Protection Company ("American LaFrance"), Figgie International ("Figgie") and any other companies affiliated with those organizations for the time period January 1, 1991, unless otherwise stated:

1. The date and State of incorporation of each company.
2. All past and present office addresses and telephone numbers of each company office and facility, and the dates thereof.
3. The office address and employment history (including job titles and responsibilities), for the period January 1, 1991 to date, of a) each present company officer and/or director and b) each former company officer and/or director who was employed at any time during that period.
4. The name and employment history (including job

[3]In March 1994, Local 669 commenced a series of requests for information on various items unrelated to the issues raised by Respondent's January 28, 1994 letter to Local 669. The requests are not relevant to those issues and are therefore not here considered.

titles and responsibilities) of each current or former director, officer, supervisor, and/or employee of any of the companies who at any time since January 1, 1991 has been or was employed by any of the other companies in any capacity.

5. The State or States in which each company has been and/or is qualified or registered to do business, and the dates the company has so qualified or registered.

6. The names under which each company trades or does business, or has traded or done business.

7. The names and addresses of all persons, corporations or other entities owning stock (and the percentage of their ownership) in each company as of January 1 of each year from 1991 to date.

8. The nature of the business of each company, including products, services, customers and locations of manufacturing, fabricating and/or sales facilities.

9. The name, title, employer and job duties of any persons who are, or who have been, responsible in any way for labor relations and/or personnel relations for each company, the period of time during which each of these persons was assigned these responsibilities, and each person's employer during each such period of time.

10. The name, title, employer of each person who had, or has responsibility for hiring, firing and Supervising employees in each company, the period of time during which each of these persons was assigned these responsibilities, and each person's employer during each such period of time.

11. Do the companies, jointly or in common, own, occupy, or lease real property? If so, the location of

the real property and the terms of the lease.
12. Do the companies use or lease real property of any of the others? If so, the location of the real property and the terms of the lease.
13. Do the companies, jointly or in common, own, or lease facilities and/or equipment? If so, the type and location of these facilities and equipment and the terms of the lease or other agreement for use.
14. Do the companies lease or use facilities and/or equipment of any of the others? If so, the type and location of these facilities and equipment and the terms of the lease or other agreement for use.
15. Do the companies own, jointly or in common, bank accounts, notes, bonds and/or types of securities? If so, the type and monetary value of the bank account and/or security. real property? If so, the location of the real property and the terms of the lease.
16. The date, terms, and parties to each contract, commitment of understanding, whether oral or written, under which the companies have been and/or are jointly obligated to engage in business activity.
17. The date, terms and parties to each contract, commitment or understanding, whether oral or written, between the companies under which one of the companies has been and/or is required or authorized to use the services, facilities, personnel, or equipment of the other company.
18. The date, terms, parties to and persons entering into each contract, commitment, or understanding, whether oral or written, between the companies.
19. The date, terms, parties to and persons entering into each contract, commitment, or understanding,

whether oral or written, under which one of the companies agreed to loan, sell and/or contribute equipment, services, money and/or any other things of value to the other company.

20. The date and substance of each bid submitted by one company for work to be performed in whole or in part by the other company.

21. The date and substance of each contract entered into by one company for work which was, or is being performed in whole or in part by the other company.

22. The identity of each person or entity that guaranteed or bonded the performance of each contract entered into by any of the above-named companies.

23. The name, effective, dates, terms and class of eligible employees, supervisors, officers and/or directors of each health, life insurance, pension, incentive, stock option, retirement and/or similar benefit plan offered by each company and whether employees, supervisors, officers and/or directors of each health, life insurance, pension, incentive, stock option, retirement and/or similar benefit plan offered by each company and whether employees, supervisors, officers and/or directors of one company participate in, or are eligible to participate in the plan of another company.

24. The nature and terms of any lines of credit, revolving credit or other credit arrangements offered by one company to the other company, the dates on which such credit was extended, the amount of credit extended, and the parties to each extension of credit.

25. The nature and amount of indebtedness owned

by each company to any of the other companies on January 1 of each year from 1991 to date.

26. The dates, participants and substance of each meeting, conference and/or discussion attended by one or more shareholders, directors, officers, supervisors and/or employees of Automatic and/or Figgie at which the formation and/or function of American LaFrance was discussed.

27. Copies of those portions of all documents, including but not limited to correspondence, memoranda, notes, and minutes, which refer, directly or indirectly, to the formation, dissolution, and/or function of American LaFrance.

28. Identify the banking institution, branch location, and account number of each company's bank account and payroll accounts.

29. Identify where and by whom each company's accounting, corporate and other business records are kept.

30. Who prepares the payroll and tax returns for each company?

31. Provide each company's business license number for each state where it does business.

32. Provide the carrier and policy number for each company's workers' compensation insurance and health insurance.

33. Provide each company's taxpayer identification number.

34. Provide the name, social security number, date of hire, wage and fringe rates for each employee of American LaFrance that has performed or that is performing bargaining unit work, since January 1, 1991.

That same day, John Gullo, Respondent's director of human resources forwarded a copy of Pro Forma III-A to Local 669. Gullo is credited that he had not previously furnished Local 669 the document because he was unaware of the document's existence. This is not implausible given the fact it was prepared in limited copies and distributed to a very few high-level officials before Gullo entered his position as director of human resources.

Tommy Preuett, Trustee of Local 669, responded to Gullo's April 22, 1994 submission on May 11, 1994, as follows:

> In reply to your letter of April 22, 1994 we seriously doubt that you have provided all of the information requested by Local 669. No substantive response has been received with regard to the Union's request dated April 22, 1994 having to do with American LaFrance. We also request that you re-review your files to see if any other responsive documents have been "inadvertently overlooked."
>
> With respect to the newly provided document, "PRO-FORMA III-A," is it a complete document? When was it prepared and by whom? Were there PRO-FORMA's I or II or III-B? What specific actions have been taken by "Automatic" and/or Figgie International, to achieve the goals and/or objectives set forth in the documents that you have provided us with, including PRO FORMA III-A?
>
> Any additional documents regarding the "Neutral Plan" in your files or in those of Figgie International are requested.
>
> Thank you for your cooperation.

This moved Gullo to respond as follows on May 19, 1994:

Reference: Your letter dated 05-11-94
Dear Mr. Preuett:

We have responded to your letter dated 04-22-94. via our letter dated 04-29-94. In our letter, we answered your questions regarding American LaFrance Fire Protection (a business segment of Interstate Engineering, a division of Figgie International) and included a response to your questionnaire. In your letter of 05-11-94, what specifically is it that you are alleging we did not respond to?

There is no need for me to AGAIN re-review our files for any documents. I stated in my April 22, 1994 letter to you that I had already done this. That is how I located the document titled "PRO-FORMA III-A, NEUTRAL OPERATIONS". Your request that I AGAIN review documents and files already reviewed is burdensome and I believe an attempt by you to waste my time and resources.

Regarding the document "PRO-FORMA III-A, NEUTRAL OPERATIONS" it is a complete document. The only part of the document that I did not provide to you is a Profit and Loss Summary due to the Neutral Operations Plan, for the years 1993 through 1997. This document contains confidential and proprietary financial information, which you have no need of, nor right to.

The document "PRO-FORMA III-A," was prepared in the November 1992 by the President and Controller of "Automatic" Sprinkler.

"PRO-FORMA III" is just a numbering scheme developed by Figgie International for identifying projects within the divisions. The number scheme is as follows:

PRO-FORMA I--These are projects that involved

the consulting firm of Boston Consulting Group. "Automatic" Sprinkler had no such projects.

PRO-FORMA III--These are projects that involved the consulting firm of DeLoitte & Touche. "Automatic" Sprinkler had no such projects.

PRO-FORMA III--These are projects that were being handled solely by the given division. "Automatic" Sprinkler had no three projects: PRO FORMA III-A, Neutral Operations Plan; PRO FORMA III-B, Service Operations Plan; and PRO FORMA III-C, International Expansion Plan, PRO FORMA III-B and C are not related to any union nor labor relations and are therefore, not provided to you.

PRO-FORMA IV--These are projects that involved capital expenditures, "Automatic" Sprinkler had no such projects.

Regarding your question about "What specific actions have been taken by "Automatic" ... to achieve the goals and/or objectives set forth...", I suggest you re-read all the correspondence and information we have been supplying to you. The correspondences and information state what actions "Automatic" has and is taking.

Please advise if you are available to meet and discuss the terms and conditions of a unit of employees restricted to welders at the Monroe, Indiana fabrication shop of "Automatic" Sprinkler and whether you wish to meet to discuss the specific aspects of the "Automatic" business plan which are appropriate for purposes of collective bargaining.

Local 669's above-noted requests for information to ASCOA are reasonably related to Local 669's function as a collective-bargaining representative and to union contract

enforcement and must therefore be produced.[4] I am inclined to agree with Respondent that it had in considerable part responded to Local 669's requests referred to in the complaint and detailed above, but the refusal to furnish Pro Formas III-B and C, which are part of the "Neutral plan" and thus of use to Local 669 in evaluating the situation confronting it, was an impermissible refusal to furnish relevant information. I have noted that Local 669, simultaneously with these requests, was asking for information on various and sundry other matters, all of which seemed to have been appropriately replied to.

Thereafter, Local 669 and Respondent continued to exchange letters concerning Respondent's disposition of its sprinkler fitters. The Respondent requested negotiations, but none took place. Although the letters of Respondent to the various charging Locals proposed bargaining on Respondent's decision to subcontract all the collective-bargaining unit's work and its effects on union member employees, it is absolutely clear from the many statements and letters of Respondent, as well as its answers to complaints issued, that Respondent always took the position its decision was irrevocable and not a bargainable issue. Respondent did, however, offer to bargain over the effects of its action. This was not acceptable to Local 669 or any of the other Charging Locals, thus the matter came before me for trial.

Local 120

ASCOA President Owen Stout directed the following letter to Lawrence Smith, financial secretary-treasurer of Local 120, on January 28, 1994:

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[4] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

> This is to serve notice that "Automatic" Sprinkler Corporation of America intends to terminate the Agreement presently between it and your Union, effective with the termination dated April 15, 1994. You are further notified that "Automatic" Sprinkler Corporation of America has made a good-faith business decision to permanently and unequivocally alter the basic direction of its business whereby it will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair and service of the "Automatic" Sprinkler fire control systems. It is the intention of "Automatic" Sprinkler Corporation of America to implement that fundamental change in its business effective April 1, 1994. In the event that you desire to discuss this business decision and the effects thereof on members of your Union who are or were employed by "Automatic" Sprinkler Corporation of America, please give me a call. You may be assured the Company will negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Smith replied to Stout's letter on February 7, 1994, as follows:

> Pursuant to the provisions of the Labor Management Relations Act, as amended, and Article XVII, of the existing labor agreement with this Union, you are hereby notified that the Union wishes to discuss with you the renewal, with modifications of our existing agreement, effective as of May 1, 1994. If renewal of the labor agreement or a new agreement is not entered into by that date, this constitutes notice that the Union reserves the right to take such legal action as

the law permits.

This does not constitute an intent to hereby terminate the existing Welfare and Pension Plans established by Employer contributions pursuant to separate agreements and declarations of trust.

The Union offers to meet and confer with you for the purpose of discussing these modifications, kindly acknowledge receipt of this communication indicating a time and place for said meeting.

ASCOA director of human resources John Gullo replied to Smith's letter on February 15, 1994, as follows:

In reply to your February 7, 1994 letter offering to meet and confer with us for the purpose of discussing modifications to the collective bargaining agreement, we refer you to our letter dated January 28, 1994, in which we advised you of the Company's intention to terminate the agreement effective with its termination date.

As stated in our letter to you dated January 28, 1994, "Automatic" Sprinkler has made a good faith business decision to permanently and unequivocally alter the basic direction of our business whereby we will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair or service of automatic fire control systems.

In our letter dated January 28, 1994, we offered to negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Our legal counsel is out of town until next week. When he returns, we will contact you regarding a time and place to meet to discuss the effects our business

decision will have on those employees affected by the decision.

Thereafter, representatives of Respondent and Local 120 met on March 29, 1994, and discussed a contract termination agreement In April 1994, their lawyers exchanged drafts of such an agreement, but no such agreement acceptable to both parties was reached.

Local 692

Respondent sent the same January 28, 1994 letter to Local 692 as it did to Local 120, with the single exception being a contract termination date of April 30, 1995.

John Gallagher, the business manager of Local 692, credibly testifies this was the first notice he received from ASCOA with respect to the information the notice contained regarding ASCOA's termination of its contract agreement with Local 692 and that ASCOA would no longer employ members of Local 692 to do its sprinkler fitter work (there is no mention of subcontracting in the letter). He recalls, however, that Respondent did subcontract two jobs in February 1994, to two contractors signatory to the Local 692 collective-bargaining agreement.

Local 536

After receiving the same January 28, 1994 letter with the correct contract expiration date of May 31, 1994, for Local 536 Robert Fique, the business manager and financial secretary-treasurer of Local 536, sent a letter to Harry Figgie Jr., chairman of the board of Figgie International, but did not get a reply from him. ASCOA did, however, send him a letter

requesting negotiations. Fique in his response agreed to this request. Respondent in turn sent Fique another letter, this time confirming a negotiations' meeting date of April 28, 1994. He is credited that this was the first time Respondent told him of its decision not to use Local 536's members for its sprinkler work.

Fique met with Respondent's attorney Donald Woodcock, ASCOA's director of human resources Gullo, and ASCOA's Baltimore district manager Arthur D. O'Neil on April 28, 1994, at Respondent's Baltimore office. Fique insisted Respondent restore his union's collective-bargaining unit before any negotiations begin. All but 2 of the 14 Local 536 members employed by ASCOA had by then been laid off. Respondent, by Attorney Woodcock, took the position it did not have to reinstate the laid-off employees. Presented with a contract termination agreement from Attorney Woodcock, Fique refused to sign it. The meeting ended with the parties maintaining the same positions they started with. There have been no further negotiations between Local 536 and Respondent.

Local 542

Ralph Boss, business manager of Local 542, also received Respondent's January 28, 1994 letter, informing him that Respondent was going to terminate its contract agreement with Local 542 upon expiration of their contract. Local 542's contract expiration date was June 30, 1994. Boss called ASCOA president Owen Stout and asked for an explanation why Respondent planned to terminate the agreement. Stout told him Respondent's new plan was a business decision. On April 5, 1994, Personnel Director Gullo wrote Boss advising his (Gullo's) letter of January 28, 1994, was notice to open negotiations regarding Respondent's "business decision and the

effects thereof on your members." As I have heretofore noted, this language is misleading because Respondent had always regarded its decision to terminate its contract agreements with all the unions to be final and not subject to negotiating. All Respondent was really offering, as its contacts with Local 542 and the other locals demonstrate, was a contract termination agreement and effects bargaining.

Boss and Jack Braun, a member of the Local 542 negotiating committee, met with ASCOA human resources director Gullo, Respondent's attorney Woodcock, and Figgie's manager of employee relations David R. Gross on May 2, 1994, at the Union's office. Boss was presented with a contract termination agreement which, like that presented to the other affected Locals, proposed (1) termination of the collective-bargaining relationship, as of June 30, 1994, (2) continued recognition of the Union until all bargaining unit members were terminated, (3) continuance of employee benefit programs in accordance with the terms of the existing contract, and (4) good-faith efforts by Respondent to secure the affected employees employment elsewhere with Respondent's subcontractors. Boss advised he would forward the document to his lawyer. The termination agreement was never agreed to. When Boss inquired if subcontracting would be confined to union contractors, Attorney Woodcock replied it would not. There was no change in Respondent's position, nor were there any agreements reached between the parties.

Local 281

Thomas Collins, business manager of Local 281, received the same January 28, 1994 letter except for the contract termination date, which was May 31, 1994 for his union. He is credited that during a one-on-one meeting with ASCOA

President Owen Stout on February 7, 1994, Stout confirmed ASCOA would subcontract its sprinkler fitter work.

Business Manager Collins and his legal counsel met with Respondent's Representatives Gullo, Gross, and Woodcock on April 27, 1994. He refused to sign the contract termination agreement Attorney Woodcock presented to him. He was advised, as were the others present, that Respondent had no plans to sign any new collective-bargaining agreement and would be subcontracting its sprinkler fitter labor work. Collins urged that Respondent consider the Union's new agreement with NFSA that was about to be completed and would permit employer subcontracting. Respondent agreed to take a look at the agreement Local 281 would reach with NFSA. Collins agreed to submit the successor agreement to Respondent for consideration on its completion, and subsequently did so. There was no response from Respondent's representatives after Collins sent the NFSA contract to them for review. There were no further meetings of Local 281 and Respondent on the matter.

Local 314

The January 28, 1994 letter to Local 314 was the same as the others except for a contract expiration date of June 30, 1994. According to Michael Poston, the business manager of Local 314, Respondent's contract with his local had an Evergreen clause and rolled over and therefore did not expire. I need not decide this issue. Poston states the January 28, 1994 letter was the first notification he had received that Respondent was not intending to use members of Local 314 to do its sprinkler fitter work. He next received an April 5, 1994, letter from Gullo purporting to be a notice to open negotiations on Respondent's business decision to permanently terminate its

contract agreement with his union and its effects on members of Local 314. After some communications between Gullo and Poston concerning a meeting date, Local 314's attorney advised Gullo by FAX on April 28, 1994 that the Union did not recognize the legality of Respondent's business decision and that a condition precedent to effects bargaining would be the restoration of the status quo ante. That ended the communications between the two parties.

Local 699

Stout's January 28, 1994 letter to Local 699, showing a contract termination date of June 30, 1995, drew a response from Local 699's attorney requesting discussion of the Respondent's decision and its effect on Respondent's Local 699 member employees. There were no further communications between the parties according to Donald Ellefson, business manager of Local 699.

Local 696

After receiving ASCOA's President Stout's January 28, 1994 letter, which noted a contract expiration date of June 30, 1994, for Local 696, a meeting was scheduled. Richard Hodavance, business manager of Local 696, two business agents of the Local, and its attorney met with Respondent's representatives Gullo, Gross, and Respondent's attorney Woodcock on May 12, 1994. After Attorney Woodcock explained Respondent's decision to subcontract sprinkler fitter labor, Hodavance asked if Respondent's subcontracting would be limited to union contractors. Attorney Woodcock's response was that Respondent would not do so, but would subcontract to reputable contractors. Local 696's attorney asked if Respondent would enter into a collective-bargaining agreement requiring

Respondent's subcontracting be to contractors that are Local 696 signatories. Respondent declined to so do. Attorney Woodcock suggested ASCOA might be amenable to project agreements. Hodavance stated Local 696 had not and would not enter into project agreements. To this statement Woodcock replied that if that was the case, ASCOA would not employ any Local 696 employees and would subcontract labor from other contractors.

There was some discussion of severance pay for members of Local 696 employed by ASCOA. No agreement was reached on this or other substantive matters.

Local 483

Local 483's contract agreement with ASCOA expired August 1, 1993. Respondent, on July 30, 1993, laid off all of its employees in the collective-bargaining unit represented by Local 483, and refused to negotiate a successor agreement with the Local. Nevertheless, ASCOA President Stout sent the following communications to Local 483, which suggest Respondent considered itself bound to Local 483 by a subsequent extension agreement between Local 483 and Castle Sprinkler Company.

November 28, 1993
Mr. Lloyd C. Barton Business Manager Sprinkler Fitters & Apprentices, Local 483
23314 Cabot Boulevard
Hayward, CA 94545

RE: "Automatic" Sprinkler Corporation of America

Dear Mr. Barton:

As of July 1, 1993, "Automatic" Sprinkler Corporation of America had entered into a

joint-employment relationship with Castle Sprinkler Company. Castle simultaneously offered employment to all "Automatic" fitters employed at that time for which there was available work. On behalf of the joint-employment relationship, Castle Sprinkler Company has since entered into an extension of the collective bargaining agreement with Local 483 that it and "Automatic" were signatory to. It seems to me that collective bargaining agreement is in full force and effect as to "Automatic." Inasmuch as "Automatic" Sprinkler Corporation of America is deemed a signatory by virtue of the actions of its joint-employer to that contract, then the union is also bound to the same terms and conditions with "Automatic."

In the event that you desire to discuss this joint employment relationship and the effect it has had on "Automatic's" former employees and your union, please feel free to give me a call.

"Automatic" Sprinkler Corporation of America

Very truly yours,
Owen G. Stout,
President

and:

November 30, 1993
Mr. Lloyd C. Barton
Business Manager
Sprinkler Fitters & Apprentices Local 483
23314 Cabot Boulevard
Hayward, CA 94545

RE: Picket Line at Dixon University, Harrisburg, PA Job Site

Dear Mr. Barton:

We have been notified that your local has established a picket line at our jobsite in Harrisburg, PA.

The picket line and strike is in violation of the agreement between "Automatic" Sprinkler Corporation of America-Castle Sprinkler Company and your local.

As stated in our letter to you dated November 29, 1993, as of July 1, 1993, " Automatic" Sprinkler Corporation of America had entered into a joint-employment relationship with Castle Sprinkler Company. On behalf of the joint-employment relationship, Castle Sprinkler Company has since entered into an extension of the collective bargaining agreement with Local, 483 that it and "Automatic" were signatory to.

Inasmuch as "Automatic" Sprinkler Corporation of America is deemed a signatory by virtue of the actions of its joint-employer to that agreement, then the union is also bound to the same terms and conditions with "Automatic".

We request that you please remove the picket line promptly. Your failure to do so will necessitate legal action. We hold your local strictly liable for any damages and costs we may incur due to this illegal action.

Very truly yours,
Owen G. Stout
President

Barton wrote to President Stout on December 1, 1993 disputing, among other things, ASCOA's theory that ASCOA and Castle Sprinkler Company were joint employers. After further exchanges, Gullo wrote Barton on April 22, 1994, as

follows:

Dear Mr. Barton:

The complaint by the National Labor Relations Board referenced in your April 13 letter, among other things, contends that "Automatic" Sprinkler Corporation of America (ASCOA) and Castle Sprinkler Company are joint employers of certain employees, who are members of your Union and are covered by a Collective Bargaining Agreement. ASCOA has acknowledged that certain facts could support that theory and on that basis contends that its joint employer, (under the theory espoused by your Union and the National Labor Relations Board), Castle Sprinkler Company has entered into a Collective Bargaining Agreement with your Union for a one (1) year term which expires July 31, 1994.

This being so, employees of ASCOA have been employed, consistent with its business operations, by its joint employer, Castle Sprinkler Company. Accordingly, there is no basis for reinstating and making whole employees who were not terminated but were simply transferred from the payroll of one joint employer to the payroll of another; a mere administrative detail unrelated to the actual employment status of the employees.

ASCOA has now determined that it desires to terminate any such joint employment relationship with agreement with Castle Sprinkler Company, as alleged, or any other sprinkler company, effective August 1, 1994.

Meanwhile, ASCOA believes it is important that the parties meet to discuss these important issues. Please provide me with all of your available dates for a

meeting during the months of May and June for the purpose of discussing the termination of the joint employment relationship between ASCOA and Castle Sprinkler Company and the negotiations of the subcontracting of installation and repair work; and the decision and the effects of that decision on the ASCOA/Castle Sprinkler Company employees.

Local 676

ASCOA president Stout's January 28 letter to Local 676 noted its contract expiration date was July 31, 1994. The Local's counsel on April 6, 1994, requested subcontracting information from Stout. This request was replied to by Gullo's letter of April 8 containing information of the nature requested. Pursuant to a further request from Local 676, Gullo furnished the Local with additional information. Local 676 then withdrew a charge it had filed on April 18, 1994, alleging a refusal of Respondent to provide the Union the information it had requested.

Local 709

On May 26, 1993, Stout wrote James Duffy, Business Manager of Local 709, that the Local's contract would terminate on September 1, 1993, in accordance with its terms. Thereafter, Local 709 negotiated a contract extension date to August 31, 1995, with NFSA. By virtue of its earlier withdrawal from NFSA, the Respondent was not party to this extended agreement and declined to agree on an extended agreement with Local 709. The members of the bargaining unit at ASCOA represented by Local 709 were laid off on August 31, 1993. Many, if not all of the members, were then employed by a union employer who was the subcontractor succeeding to

the same kind of sprinkler fitter labor previously done by ASCOA with the aforesaid unit members.

Duffy subsequently met with Stout in November 1993. Stout then told him, as had Michael May, ASCOA's operations manager in Los Angeles, in August 1993, that ASCOA was subcontracting its sprinkler fitter labor. Duffy credibly states May also told him in February 1993, when May was the district manager for ASCOA in Los Angeles, California, that Respondent had a 5-year plan to become a general contractor. May added he did not know what that meant, but that was what he had been told.

A memo from Gullo to Respondent's counsel and manager of employee relations, Gross, dated June 8, 1994, relates the following concerning Duffy's November 10, 1993 meeting with Stout:

> On or about November 10, 1993, Duffy did visit our Broadview Heights office to informally meet with Stout. They discussed the construction market in Los Angeles. The general feeling was that the market was very bad and would not likely improve in the near future.
>
> Stout explained to Duffy our plan to subcontract our labor.
>
> Duffy asked if "Automatic" would be willing to sign a collective bargaining agreement with local 709. Stout remarked the this was a subject that needed to be discussed in formal negotiations and was not something he could commit to without discussion with individuals at Figgie International.
>
> That is all Stout recalls regarding the meeting.

Gullo's memo in this regard is reliable hearsay with probative worth. American Art Clay Co., 148 N.L.R.B. 1209, 1219 fn. 16 (1964).

Respondent has refused to negotiate successor bargaining agreements with all of the Charging Locals.

After termination of the various Local's contracts, a number of the ASCOA employees who had lost their jobs with the implementation of the "Neutral Plan" became subcontractors to ASCOA with the aid of ASCOA including the use of vehicles and other equipment which the subcontractors bought or leased from Respondent. Some of ASCOA's new subcontractors undertook that role at the suggestion and encouragement of ASCOA officials who were instructed to so do by their superiors. Many other employees became employees of subcontractors. This is not surprising given the special expertise they possessed in sprinkler fitting. Other unit employees became salaried inspectors for ASCOA.

B. Discussion and Conclusions

1. The refusal to furnish information

The Board in W-L Molding Co., 272 N.L.R.B. 1239, 1240 (1984), succinctly summarized the law applicable to situations like that here presented in the following terms:

> [A] broad discovery-type standard is applicable to requests for information relevant to a union's functions of negotiating and policing compliance with a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *General Motors v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983);

> *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). "It is not the Board's function in this type case to pass on the merits of the Union's claim that Respondent breached the collective bargaining agreement or . . . committed an unfair labor practice." *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957. "Thus, the union need not demonstrate actual instances of contractual violations before the employer must supply information." *Boyers Construction Co.*, 267 N.L.R.B. 227, 229 (1983). "Nor must the bargaining agent show that the information which triggered its request is accurate, nonhearsay, or even ultimately reliable." *Ibid.* "The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957 quoting *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. Accord: *General Motors v. NLRB*, 700 F.2d at 1088. [Footnote omitted.]

The facts before me suggest the Union's requested and denied information is arguably relevant and would be of use to Local 669 in its role as a collective-bargaining representative of Respondent's employees. The failure to completely provide that information therefore violated Section 8(a)(5) and (1) of the Act as the complaint alleges.

With respect to Respondent's suggestion that Local 669's numerous requests for various other information unrelated to the requests at issue herein were intended to hinder or impede Respondent in the negotiating process and therefore caused Local 669 to lose any statutory right it had to the information here requested, citing *NLRB v. Wachter Construction*, 23 F.3d

1378 (8th Cir. 1994), I first note with respect that I am bound to follow Board precedent,[5] and here the Board disagreed with the circuit court.[6] Moreover, the record in the instant case shows no persuasive evidence other than the bulk of the requests (to which Gullo responded with no apparent difficulty) to support a harassment theory whereas *Wachter* contained clear evidence of deliberate harassment by a union official. There is no solid evidence that Local 669 was posing its various requests for the purpose of harassment or that its requests, which were largely responded to, were irrelevant to any legitimate union concern. That Respondent may suspect harassment does not make it so.

2. The "Neutral Plan," its purposes and implementation

Respondent would have me believe that the development and implementation of the "Neutral Plan" was pure as driven snow, free from discriminatory intent, and a fundamental change in Respondent's business. Exceptionally able counsel for the Respondent skillfully argued that conclusion. I cannot agree, although I admire the advocacy. Reduced to its simplest terms, what we have here is a Respondent eager to dispose of union representation of its employees and the resulting bargaining agreement restricting it from freewheeling in its contracting for the installation of its product. Pro Forma III-A clearly demonstrates Respondent's dislike of the restrictions imposed on it by union representation of its employees, and its desire to be a union-free employer. Respondent had contemplated the possibility of going nonunion for some time

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[5] *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615 (1963).

[6] *Wachter Construction, Inc.*, 311 N.L.R.B. 215 (1993).

prior to its adoption of the "Neutral" plan, and after some misgivings, took the plunge. Thereafter, as its messages to its supervisors and its assurances to union agents of continuing relations demonstrate, Respondent went to considerable pains to mislead the unions into believing that it was merely extending its subcontracting. The suspicion of Business Manager Simpson of Local 669 and others that Respondent was up to something more, and the advice ASCOA's president, Stout, gave to Duffy after Respondent had laid off all of its Local 709 employees that it would henceforth be a general contractor, are no substitute for Respondent's prior notice of its real intent to be nonunion. Respondent had carefully avoided any overt subcontracting to nonunion employers prior to its January 28, 1994 notice of intention to destroy all its union sprinkler fitter units as circumstances permitted, i.e., contract terminations, even to the extent of misleading its district managers via its February 11, 1993 memo assertion the new program would force Respondent to work directly with the Unions for the benefit of both. Its concealment commenced with its notice to NFSA that it intended to bargain individually with the Unions, continued with its reassurances to Simpson that there would be contractual relationships with Local 669 in the future, and its care in avoiding overt nonunion connections until its dramatic announcement of January 28, 1994. That announcement itself was designed to mislead the Unions. It invited bargaining on Respondent's decision to no longer employ the Locals' members, but the record clearly shows Respondent had no intention of bargaining on its decision. All Respondent was willing to do was discuss the effects of its decision on the laid-off employees and secure a written agreement from the Unions to terminate its collective-bargaining relationships.

3. Affirmative defenses

Respondent raises several defenses to justify its behavior. It contends that clauses in the various collective-bargaining agreements permitting Respondent to subcontract to other employers who have collective-bargaining agreements with the unions constitute waivers of bargaining rights concerning subcontracting during the term of those agreements. Although the clauses do permit subcontracting to other employers signatory to incumbent unions' agreements, they certainly do not permit subcontracting to nonunion firms, nor do they prohibit bargaining on subcontracting upon the expiration of the collective-bargaining agreements. They do not waive the right to bargain over a decision to destroy bargaining units through the use of subcontracting or the implementation of such a decision.[7]

The Respondent also contends the Union's waived their rights to bargain over Respondent's decision by failing to request bargaining after learning of Respondent's "General Contractor Decision" throughout the course of 1993. The fact is that all the Unions really knew was that there was an increase in subcontracting by Respondent in some areas. Respondent deliberately concealed its decision to totally sever connections with the Unions until January 28, 1994, and even then, as above noted, falsely advised the Unions its decision was bargainable. I do not believe the Unions were required to decipher the various conflicting signals given them by the Respondent or its unrevealed intentions. It was Respondent's

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[7]Respondent's reliance on *Mine Workers District 31 v. NLRB*, 131 L.R.R.M. 3131 (D.C. Cir. 1989), is misplaced because the facts in that case bear no resemblance to those presently before me.

obligation to promptly and completely advise the Unions of its plans to no longer hire union member sprinkler fitter laborers when its plans were solidified if it expected the Unions to request bargaining on the decision. By depriving the Unions of such prompt knowledge and embarking on a course of deception, the Respondent forfeited any claim it might have otherwise had that the Unions waived their rights to bargain on its decision.

Respondent further urges that the Charging Parties waived the right to bargain on the "General Contractor Plan" by failing to respond to Respondent's requests to bargain with them accompanying its written notices of implementation of its plan. The quick response to this assertion is that a party is not required to engage in a futile act. The record firmly establishes that the Respondent had absolutely no intention of bargaining about the "Neutral Plan." The Unions did not waive bargaining rights by failing to take part in Respondent's charade.

The argument of Respondent that, because Locals 120, 542, 696, and 676 had an 8(f) agreement with Respondent, Respondent was free under *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), to terminate the contracting relationship at the contract's expiration date without notice or invitation to bargain is accurate, but that does not insulate Respondent from liability for conduct violative of Section 8(a)(3) of the Act I am persuaded, for reasons set forth below, Respondent's conduct was motivated by antiunion animus and violated Section 8(a)(3) of the Act with respect to all of the affected employees represented by all the Charging Unions, whether represented pursuant to a 9(a) or 8(f) arrangement.

As a separate defense, Respondent contends complaint allegations are time barred by Section 10(b) of the Act, which

provides, in relevant part, "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." It is, however, well settled that the deliberate concealment of unlawful conduct tolls the 10(b) period and the burden is on the respondent to show the charging party was clearly and unequivocally put on notice of the conduct complained of prior to the commencement of the six months period set forth in the statute.[8] Here Respondent concealed its decision to totally dispose of union representation of its sprinkler fitters until January 28, 1994. I do not believe the Unions were required to affirmatively ferret out every intention of the Respondent which it even withheld from its own supervisors, note the failure of Respondent to even advise its director of human resources, Gullo, of the existence of its Pro Forma documents until after it advised the Unions of its plans on January 28, 1994. Accordingly, I conclude Section 10(b) provides no defense to Respondent's conduct.

Concluding Findings

I agree with General Counsel that the primary aim of Respondent, as shown by the content of Pro Formas III-A and B and the concealment of its ultimate intent from not only the Unions but its own managers, was to rid itself of union representation in order to indulge itself in nonunion subcontracting. This conduct, in the words of the Supreme Court,[9] was "so inherently distractive of employee interests'

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[8]See, e.g., *Barnard Engineering Co.*, 295 N.L.R.B. 226, 249 (1989).

[9]*NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

that it may be deemed proscribed without need for proof of an underlying improper motive . . . [and] carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent."

Furthermore, General Counsel has shown that the desire to rid itself of the Local Unions, thereby discouraging union activity, was at the very least one of the motivating factors in its decision to become a general contractor and subcontract all its sprinkler installation work. Respondent therefore is obliged to show by a preponderance of the evidence it would have done so in the absence of union representation of its employees. *Wright Line*, 251 N.L.R.B. 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Respondent has not carried this burden. I therefore find Respondent's conduct in terminating its union member employees, severing its relationships with the contracting unions, turning toward nonunion subcontracting, and concealing its ultimate plan from the Unions violated Section 8(a)(3) and (1) of the Act whether the reasoning in *Great Dane*, supra, or *Wright Line*, supra is applied.

Respondent also violated Section 8(a)(5) of the Act by its conduct of not giving the 9(a) unions prior notice of and opportunity to bargain on its decision to subcontract all its sprinkler installation work and to thereby replace its union employees with those of nonunion or other more malleable employers. The Supreme Court noted in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964) that: "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment--is a statutory subject of collective bargaining." The Board has followed that precedent where the

employer's decision to subcontract does not turn on a change in the scope, nature, or direction of its business and is amenable to collective bargaining. *Executive Cleaning Services*, 315 N.L.R.B. 227 (1994); *Compu-Commnications*, 315 N.L.R.B. 216 fn. 2 (1994); *Acme Die Casting*, 315 N.L.R.B. 202 fn. 1 (1994). Contrary to Respondent's argument, all that happened here was a substitution of one group of workers to perform the work of another, and not a change in the scope and direction of the enterprise which continues to manufacture, sell, and arrange the installation of sprinkler systems which it subsequently inspects with its own employees. The only difference is that subcontractors' employees now do the same work as ASCOA's sprinkler fitters had previously done, and utilize the same vehicles, tools, and other equipment ASCOA employees had used to do the same type work. The above-quoted statement in *Fibreboard* fits this situation exactly, and Respondent's concealment of its decision and the failure of Respondent to give timely notice to the Unions of its decision and thus provide them with an opportunity to bargain when it yet had some bargaining power did not satisfy its statutory obligation. *Your Host, Inc.*, 315 N.L.R.B. No. 40, slip op. at 3 (Oct. 6, 1994). Accordingly, I find that the Respondent (Figgie and ASCOA) violated Section 8(a)(5) and (1) of the Act by adopting and implementing its decision to subcontract all its sprinkler fitter labor without giving prior notice to the 9(a) unions named in this decision and without providing them with an adequate opportunity to bargain over the decision and/or its effects on ASCOA employees. Moreover, by rejecting the requests of the Sec. 9(a) unions, whose majority status is not in question, to bargain successor agreements, Respondent again violated Section 8(a)(5).

I have previously noted that Respondent failed and refused to furnish Local 669 with certain information to which it was

entitled because that information as relevant and necessary to Local 669's function as the collective-bargaining representative of certain of ASCOA's employees and for contract enforcement efforts. I therefore now find the failure and refusal of Respondent to furnish Local 669 with that information violated Section 8(a)(5) and (1) of the Act. See *Acme* and *Truitt*, supra.

General Counsel also alleges Respondent unlawfully refused to furnish Local 669 with information, citing the following February 15, 1994 letter from Local 699's attorney to ASCOA's president, Owen Stout, as the unanswered request.

> Dear Mr. Stout:
>
> This office represents Local 699 and they have asked us to review your letter of January 28, 1994 directed to Don Ellefson, the business manager.
>
> They have requested I correspond with you to express their desire to discuss the business decision set forth in your letter and the effect thereof on the members of Local 699 who may be employed by Automatic Sprinkler. They need to clearly understand the intentions of Automatic Sprinkler and acquire as much information as possible to determine the effects on the employees and the impact on the collective bargaining agreement.
>
> They would request a meeting with you or your representative as much in advance of the April 1, 1994 date as may be possible. Please feel free to contact Mr. Ellefson directly to establish the manner and time of meeting.
>
> Your cooperation in this regard will be much appreciated.

I do not believe this letter conveys an express request sufficient

to trigger Respondent's obligation to reply. Accordingly, I find no merit in the allegation.

The termination of one McGuire and other employees specifically named as discriminatees in the complaint was caused by Respondent's implementation of its subcontracting plan, which violated Section 8(a)(5), (3), and (1) of the Act. The discharge of these employees, as well as all other sprinkler fitters terminated by Respondent in the illegal implementation, is therefore a violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent (Figgie and ASCOA) is a single-integrated business enterprise and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Local Unions enumerated in the case caption are each labor organizations within the meaning of Section 2(5) of the Act.

3. Each of the Local Unions was at all times material to this proceeding party to a collective-bargaining agreement covering a unit of Respondent's sprinkler fitters.

4. By terminating the employees represented by all the Local Unions who filed the charges in this proceeding and severing its contractual relationships with said Local Unions in order to engage in nonunion subcontracting, thereby discouraging union membership, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By unilaterally subcontracting unit work, by refusing to

bargain concerning successor agreements with Locals 669, 692, 536, 218, 314, 699, 483, and 709, and by failing to give them prior notice and an opportunity to bargain, and by refusing to bargain with them over the decision and effects of subcontracting all the work being performed for Respondent by its employees represented by said Local Unions, and by terminating said employees, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By refusing to furnish Local Union 669 with requested information that is relevant and reasonably necessary to its function as the collective-bargaining representative of a unit of Respondent's employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist and notice-posting requirements, I shall recommend Respondent be: (1) required restore all of its subcontracted operations previously performed by employees represented by the Local Unions enumerated in this Decision, whether they be Section 9(a) or 8(f) representatives; (2) reinstate all employees terminated as a result of the subcontracting, and make them whole for monetary losses caused by the subcontracting. Backpay, with interest, shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950), with interest computed as prescribed in *New Horizons for the Retarded*, 283

N.L.R.B. 1173 (1987);[10] (3) bargain with the 9(a) representatives concerning its decision to subcontract and its effects on unit employees and for successor agreements; and (4) furnish the information to Local 669 which I have found was unlawfully withheld. I shall also recommend a broad cease-and-desist order because of the national scope and seriousness of Respondent's unfair labor practices. *Hickmott Foods*, 242 N.L.R.B. 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Figgie International Inc. and "Automatic" Sprinkler Corporation of America, a single-integrated business enterprise, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating union-represented employees whether their representative enjoys 9(a) or 8(f) status, and unilaterally severing bargaining relationships with unions selected by employees as their sole collective-bargaining representative, in accord with Section 9(a) of the Act for the purpose of engaging

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[10]Under *New Horizons*, interest on and after January 1, 1987, is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621.

[11]If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in nonunion subcontracting, and thereby discouraging union activity.

(b) Unilaterally subcontracting unit work and failing to give prior notice and an opportunity to bargain to the Section 9(a) representatives over the decision to and effects of subcontracting aforesaid first hereof.

(c) Refusing to furnish Local 659 with requested information relevant and reasonably necessary to its function as the collective-bargaining representative of Respondent's employees.

(d) Refusing to bargain successor agreements with Section 9(a) bargaining representatives of Respondent's employees.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.[13]

5. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore all of the subcontracted operations previously performed by employees represented by Locals 659, 150, 853, 230, 245, 581, 314, 999, 696, 483, 747, and 707.[14]

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[13]The national scope of Respondent's conduct, the seriousness of that conduct, and the willingness of Respondent to engage in deception in order to avoid its responsibilities under the Act requires a broad cease-and-desist order. Hickmott Foods, 245 N.L.R.B. 1327 (1979).

[14]Respondent may introduce evidence, if there is any, at the compliance stage of this proceeding to demonstrate restoration of the subcontracted operations involved herein is unduly burdensome. See

(b) Reinstate all employees represented by said unions and terminated as a result of the subcontracting and make them whole for any loss of earnings they suffered by reason of that unlawful termination, said backpay to be computed in the manner described in the remedy section of this decision.

(c) Bargain with Local Unions 999, 935, 239, 581, 314, 999, 483, and 707, upon request, concerning the decision to subcontract and its effects on employees, and for successor collective-bargaining agreements.

(d) Furnish the requested information to Local 999 that I have found was unlawfully withheld by Respondent.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at all its offices in the continental United States, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter, in conspicuous places including all places where notices to

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Cowan-Nat, supra at fn. 3.

[14]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 30, 1994

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate employees in order to engage in recognition picketing.

WE WILL NOT unilaterally subcontract bargaining unit work.

WE WILL NOT refuse to bargain with Local Unions 684, 845, 230, 581, 314, 698, 483, or 709, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO concerning our decision and the effects thereof of subcontracting all work performed by employees represented by the unions.

WE WILL NOT refuse to bargain with Local Union 689, 685, 238, 581, 314, 688, 483, or 709 concerning successor collective-bargaining agreements.

WE WILL restore all of the subcontracted operations previously performed by employees represented by Local Unions 689, 150, 685, 238, 245, 581, 314, 688, 680, 483, 670, and 709.

WE WILL offer reinstatement to all employees who were terminated as a result of our unlawful subcontracting and make them whole for any loss of earnings they suffered by reason of that unlawful termination, with interest computed thereon.

WE WILL bargain with Local Unions 689, 685, 238, 581, 314, 688, 483, and 709, upon request, concerning the decision to subcontract and its effects on employees, and for successor collective-bargaining agreements.

WE WILL promptly furnish Local 689, if it so wishes, with information previously requested and relevant and reasonably necessary to its function as a collective-bargaining representative of our sprinkler fitter employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

AUTOMATIC SPRINKLER CORPORATION
OF AMERICA AND FICCIE
INTERNATIONAL INC.

APPENDIX E

The provisions of the National Labor Relations Act, as amended, which are involved herein are as follows:

SEC. 7. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . .

* * * *

SEC. 8. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer-

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . . .

* * * *

(5) to refuse to bargain collectively with the representatives of his employees . . . .

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification-

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within fifty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute

occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

Supreme Court, U.S.
FILED
MAR 30 1998
CLERK

(3)

No. 97-1249

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, ETC.,
PETITIONER

v.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
Acting General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in rejecting the National Labor Relations Board's determination that the employer violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by subcontracting out all of the work performed by its unionized employees in order to rid itself of the union.

2. Whether the court of appeals erred in rejecting the Board's determination that the employer violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by refusing to bargain with respect to its decision to subcontract out all of the work performed by its unionized employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 120 F.3d 612. The decision and order of the National Labor Relations Board (Pet. App. 26a-35a) and the decision of the administrative law judge (Pet. App. 35a-95a) are reported at 319 N.L.R.B. 401.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1997. Petitions for rehearing were denied on October 31, 1997. Pet. App. 22a-23a. The petition for a writ of certiorari was filed on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Automatic" Sprinkler Corporation of America (ASCOA) designs, fabricates, and installs automatic fire protection systems. Pet. App. 2a, 37a.[1] Prior to the events that gave rise to this litigation, ASCOA's employees, known as "sprinkler fitter" workers, were represented by 12 locals of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (the Union). *Id.* at 2a n.1. Petitioner was one of those locals. *Id.* at 2a-3a. Eight of the locals, including petitioner, had majority-representative status among their respective bargaining units pursuant to Section 9(a) of the National Labor Relations Act (the Act), 29 U.S.C. 159(a). Pet. App. 38a. The remaining locals represented the employees in their respective bargaining units on a non-majority basis, as permitted by Section 8(f) of the Act, 29 U.S.C. 158(f). Pet. App. 39a.

ASCOA, through its membership in a multi-employer bargaining association, the National Fire Sprinkler Association, was a signatory to labor contracts with the Union. Pet. App. 2a-3a, 41a-42a. The expiration dates of ASCOA's contracts ranged from July 31, 1993, to June 30, 1995, depending on the local involved. *Id.* at 3a. ASCOA's contracts with 11 of the 12 locals (including petitioner) permitted it to subcontract work to other employers, provided that those

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[1] ASCOA is a division of Figgie International, Inc., which was also a party to the proceedings in the court of appeals. Pet. App. 1a-2a. ASCOA and Figgie are a single integrated business enterprise controlled by Figgie. *Id.* at 2a, 37a-38a, 89a. Because the nominal distinction between the two companies is of no material significance here, we refer to ASCOA and Figgie collectively as "ASCOA."

employers also had signed labor contracts with the Union. *Id.* at 3a, 47a, 83a.

In November 1992, ASCOA adopted a business strategy, known as the "Neutral Plan." The Neutral Plan provided that, in January 1993, ASCOA would become a general contractor, and that, by August 31, 1995, ASCOA would subcontract out all of the sprinkler fitter work that was being performed by its employees in the bargaining units represented by the Union locals. Pet. App. 3a, 42a-46a. According to Owen Stout, ASCOA's President, ASCOA's "primary concern" in developing the Neutral Plan was "to increase its share of the fire protection market by being free from the unions' collective-bargaining agreements' restrictions on subcontracting that forbade [ASCOA] to subcontract to nonunion firms." *Id.* at 43a. An internal company document, known as "Pro Forma III-A," described the "benefits" that would inure to ASCOA under the Neutral Plan as including "[g]ain[ing] control of labor costs on projects," "[e]liminat[ing] labor negotiations," and "[e]liminat[ing] costs associated with union grievances." *Id.* at 44a.

On February 10, 1993, ASCOA withdrew from membership in the National Fire Sprinkler Association. Pet. App. 3a, 46a. On January 28, 1994, ASCOA sent letters to ten of the 12 Union locals (including petitioner) stating that it intended to "terminate" that local's labor contract, effective on its expiration date. The letters also stated that ASCOA had made "a good-faith business decision to permanently and unequivocally alter the basic direction of its business whereby it will no longer employ persons represented by your Union." *Id.* at 4a, 48a-49a, 65a-66a, 68a-72a, 77a. Although ASCOA offered to bargain with the

locals about its decision to subcontract out all of the work being performed by the employees in the bargaining units, ASCOA regarded that decision as irrevocable and not subject to negotiation. *Id.* at 65a; see also *id.* at 32a, 82a. Ultimately, ASCOA discharged the employees represented by the locals and severed its contractual relationships with the locals. *Id.* at 79a, 89a.

2. a. Acting on charges filed by the Union, the National Labor Relations Board's General Counsel issued a complaint against ASCOA, alleging violations of Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5). Pet. App. 35a-36a & n.1. Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e]" with regard to hiring, tenure, or terms or conditions of employment in order to "discourage membership in any labor organization." 29 U.S.C. 158(a)(3). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. 158(a)(5).

After a hearing, the administrative law judge sustained the allegations of the complaint. He concluded that ASCOA had violated Section 8(a)(3) by "terminating the employees represented by all the Local Unions * * * and severing its contractual relationships with [the] Local Unions in order to engage in nonunion subcontracting, thereby discouraging union membership." Pet. App. 89a; see also *id.* at 86a. He found that ASCOA's "primary aim" in adopting the Neutral Plan was "to rid itself of union representation in order to indulge itself in nonunion subcon-

tracting." *Id.* at 85a.[2] He also found that ASCOA had failed to sustain its burden of demonstrating, by a preponderance of the evidence, that it would have developed and implemented the Neutral Plan even "in the absence of union representation of its employees." *Id.* at 86a.

The ALJ further concluded that ASCOA had violated Section 8(a)(5) by failing to give the eight majority-representative locals, including petitioner, "prior notice and an opportunity to bargain" over ASCOA's decision to "subcontract[] all the work being performed for [ASCOA] by its employees represented by [those locals]." Pet. App. 90a; see also *id.* at 86a, 87a. He explained that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment * * * is a statutory subject of collective bargaining." *Id.* at 86a (quoting *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 215 (1964)). He found that "all that happened here was a substitution of one group of workers to perform the work of another," that

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[2] In so finding, the ALJ observed that the Pro-Forma III-A, a company document, "clearly demonstrates [ASCOA's] dislike of the restrictions imposed on it by union representation of its employees, and its desire to be a union-free employer"; that ASCOA "went to considerable pains to mislead the unions into believing that it was merely extending its subcontracting," whereas its "real intent [was] to be nonunion"; and that ASCOA "had carefully avoided any overt subcontracting to nonunion employers prior to its January 28, 1994 notice of intention to destroy all its union sprinkler fitter units * * * even to the extent of misleading its district managers * * * [that] the new program would force [ASCOA] to work directly with the Unions for the benefit of both." Pet. App. 81a-82a.

ASCOA "continues to manufacture, sell, and arrange the installation of sprinkler systems," and that "[t]he only difference is that subcontractors' employees now do the same work as ASCOA's sprinkler fitters had previously done, and utilize the same vehicles, tools, and other equipment ASCOA employees had used to do the same type work." *Id.* at 87a.

While acknowledging that ASCOA's labor agreements "permit subcontracting to other employers signatory to incumbent unions' agreements," the ALJ rejected ASCOA's contention that those subcontracting clauses "constitute waivers of bargaining rights concerning subcontracting during the term of those agreements." Pet. App. 83a. He concluded that the clauses could not be construed to "waive the right to bargain over a decision to destroy bargaining units through the use of subcontracting." *Ibid.*

b. The Board affirmed the ALJ's findings and conclusions. Pet. App. 26a-35a. In concluding that ASCOA violated Section 8(a)(3) of the Act "by subcontracting the unit work and discriminatorily laying off the unit employees," the Board noted that ASCOA's own document, the Pro-Forma III-A, constituted "direct evidence * * * that [ASCOA's] decision to subcontract the unit work was discriminatorily motivated as it sought to rid itself of union-represented employees." *Id.* at 30a.

In concluding that ASCOA also violated Section 8(a)(5) by refusing to bargain with the eight majority-representative locals about the decision to subcontract the work being performed by their members, the Board found it "clear that [ASCOA's] subcontracting decision was a mandatory subject of bargaining"

under *Fibreboard*. Pet. App. 31a.[3] The Board explained that "an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise." *Id.* at 32a.

The Board issued a remedial order that required ASCOA, among other things, to reinstate and make whole all employees who were discharged "as a result of the subcontracting" and to bargain with the majority-representative locals "concerning the decision to subcontract and its effect on employees, and for successor collective-bargaining agreements." Pet. App. 32a-35a, 91a-95a.

3. The court of appeals, with one judge dissenting in part, denied enforcement of the Board's order. Pet. App. 1a-21a. The court reversed the Board both on "the issue of [ASCOA's] duty to bargain" under Section 8(a)(5) and on "the issue of [ASCOA's] discrimination against the unions" under Section 8(a)(3). *Id.* at 14a, 15a.

a. On the Section 8(a)(5) duty-to-bargain issue, the court determined that "the language in the collective bargaining agreements * * * unambiguously granted [ASCOA] the authority to subcontract work,

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[3] The Board found that ASCOA "in effect substituted the subcontractors' employees for its own," that ASCOA "continues to install and maintain sprinkler systems," and that "labor costs, which the Local Unions had substantial authority to control, constituted the principal basis for [ASCOA's] subcontracting decision." Pet. App. 31a. The Board also agreed with the ALJ that ASCOA had "presented the Local Unions with a fait accompli and then sought to have them engage in the futile act of bargaining about that decision." *Id.* at 32a.

without limitation, provided it was to contractors that had agreements with the unions." Pet. App. 8a. The court further determined that ASCOA had, in fact, "restricted [its] subcontracting to union contractors" during the term of its contracts with the locals. *Id.* at 8a-9a. The court thus concluded that in "determining that [ASCOA] violated section 8(a)(5) by refusing to bargain with the unions concerning [its] decision to subcontract to union signatories during the term of the agreements, the Board has refused to give meaning and effect to the parties' contractual provisions concerning subcontracting." *Id.* at 9a.

The court further stated that "[a]lthough when a collective bargaining agreement expires, an employer has a continuing duty to bargain in good faith and maintain the *status quo* as to conditions of employment in the expired agreement, * * * it has no such absolute duty at the agreement's termination." Pet. App. 11a. Noting that "[n]either the ALJ nor the Board determined that the agreements with the eight local unions that had section 9(a) bargaining status * * * were ineffectively terminated," the court stated that, when those agreements "terminated, rather than merely expired * * * and because the agreements did not provide otherwise, [ASCOA was] relinquished of any contractual or statutory obligations to the unions." *Id.* at 9a, 11a. The court concluded that ASCOA "cannot now be forced to negotiate new agreements with the unions or be prohibited from engaging in nonunion subcontracting." *Id.* at 11a.

The court distinguished *Fibreboard*, which the Board relied upon in concluding that ASCOA was obligated to bargain about the subcontracting of union work, on the ground that "[t]hat case involved an

employer's decision which did not change its basic operations," whereas ASCOA sought "to fundamentally change the nature of [its] base business from construction to service." Pet. App. 11a, 15a. The court concluded that the "more pertinent" authority was *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), which held that an employer's unilateral decision "to cut back and terminate certain union employees" was not an unfair labor practice, where that decision "involved 'a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all.'" Pet. App. 12a (quoting *First National Maintenance*, 452 U.S. at 677). The court also noted that "neither *Fibreboard* nor *First National* involved the case where, as here, the employer and the local unions had already bargained and provided for the specific right to subcontract or to layoff for economic reasons." *Id.* at 13a.

b. On the Section 8(a)(3) discrimination issue, the court acknowledged that the Board had found that "the benefits expected to result from the Neutral Plan," such as "gaining control of labor costs" and "eliminating labor negotiations," constituted "direct evidence that [ASCOA's] actions of subcontracting unit work and discharging unit employees were motivated by anti-union animus." Pet. App. 14a. The court also recognized, however, that ASCOA "expected the Neutral Plan to result in the reduction of vehicle costs, the elimination of road tool costs, and entrance into the residential market"—which would be "legitimate reasons for the decision to adopt the Plan" as would be "the desire to fundamentally change the nature of [ASCOA's] base business from construction to service." *Id.* at 14a-15a. The court concluded that, regardless "whether [ASCOA] ha[d]

met [its] burden" under Section 8(a)(3) of demonstrating that it would have adopted the Neutral Plan in the absence of the employees' union representation, ASCOA's "actions were justified under the subcontracting provisions of the parties' collective bargaining agreement." *Id.* at 15a.

c. Judge Ryan dissented from the panel majority's ruling on the Section 8(a)(3) issue. Pet. App. 15a-21a. While expressing "considerable doubt" as to the Board's finding that ASCOA's subcontracting decision violated Section 8(a)(3), he reasoned that, "given [the ALJ's] assessment of the credibility of the witnesses, there is substantial evidence justifying the conclusion that the employer's subcontracting decision was, in fact, discriminatory." *Id.* at 17a. He added that the majority's reference to the contractual subcontracting clauses "begs the question" of "whether [ASCOA's] actions were, indeed, taken 'under the subcontracting provisions of the parties' collective bargaining agreement' or were taken for the forbidden discriminatory reason of anti-union animus aimed at simply ridding the employer of the financial burdens of a portion of its unionized workforce." *Id.* at 21a.[4]

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[4] Judge Ryan agreed with the panel majority that ASCOA had no duty to bargain under Section 8(a)(5) with respect to its decision to subcontract the work of the bargaining units. Pet. App. 15a-16a. He concluded, however, that "the absence of the duty arises from the terms of the collective bargaining agreement, and not from any supposed distinction between the 'expiration' of the agreement and its 'termination.'" *Id.* at 16a.

DISCUSSION

1. Petitioner contends (Pet. 10, 13-21) that the right of employees under Section 8(a)(3) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(3), to be free from adverse employer action designed to discourage union membership cannot be waived through the collective bargaining process. Petitioner views the court of appeals as having held otherwise in stating that, "[r]egardless of whether [ASCOA] ha[s] met [its] burden" of proving that "the adverse action would have occurred in the absence of union representation of [its] employees," ASCOA's action was "justified under the subcontracting provisions of the parties' collective bargaining agreement." Pet. App. 15a.

Contrary to petitioner, we do not read the court's opinion as setting forth any rule of general application with regard to waivers of employees' rights under the Act. The court did not explicate its decision on the Section 8(a)(3) issue beyond the few words quoted above. See Pet. App. 15a. Much less did the court address whether, or to what extent, its decision is consistent with those of this Court or other courts of appeals. It thus appears that the court perceived its decision as being limited to the particular facts of this case. Moreover, because ASCOA did not raise the subcontracting clause as a defense to the Section 8(a)(3) charge before the National Labor Relations Board or in its opening brief in the court of appeals (see NLRB Reh'g Pet. 6), the court did not have the benefit of the Board's or petitioner's analysis of the implications of such a defense. We therefore believe

that the court's treatment of the Section 8(a)(3) issue does not merit this Court's review.[5]

2. Petitioner further contends (Pet. 10-11, 21-25) that the court of appeals erred in failing to apply a "clear and unmistakable" waiver standard, and thereby deepened a conflict among the circuits, in concluding that the subcontracting clause constituted a waiver of the employees' right, under Section 8(a)(5), to bargain over ASCOA's decision to implement the Neutral Plan. The administrative law judge did not indicate that he was applying a "clear and unmistakable" waiver standard, however, when he declined to construe the subcontracting clause as authorizing ASCOA to subcontract out all of its sprinkler fitter work. See Pet. App. 83a. Nor did the court of appeals reject the "clear and unmistakable" waiver standard in construing the subcontracting clause as providing such authorization. See *id.* at 8a-9a. The court's broader interpretation of the subcontracting clause does not, therefore, appear to turn on

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[5] The court's disposition of the Section 8(a)(3) issue may well have been colored by its skepticism, shared by the dissenting judge, as to the Board's finding that ASCOA's subcontracting decision was primarily motivated by anti-union animus. See Pet. App. 14a-15a (noting that ASCOA had several "legitimate reasons for the decision to adopt the [Neutral] Plan"); *id.* at 17a (Ryan, J., dissenting in part) (expressing "considerable doubt" about the Board's findings on the Section 8(a)(3) issue). Of course, even if this Court were to grant the petition for certiorari and ultimately to hold that the existence of the subcontracting clause did not preclude a Section 8(a)(3) claim, the court of appeals would still be free to consider on remand whether to deny enforcement of the Board's remedial order on the alternative ground that the Board's finding of a Section 8(a)(3) violation was not supported by substantial evidence.

the legal standard necessary to establish a waiver of rights under the Act.[6]

In any event, the court of appeals' opinion can be read as holding that, even apart from the subcontracting clause, ASCOA had no Section 8(a)(5) obligation to bargain with the Union over the Neutral Plan. The court explained that the situation here, unlike that in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), involved "a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all." Pet. App. 12a (quoting *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 677 (1981)). The court thus viewed this case as involving a situation more like that in *First National Maintenance*, which held that the Act did not mandate bargaining about an employer's decision to change significantly the nature of its business. *Id.* at 12a-13a. The court's conclusion that ASCOA's subcontracting decision more closely resembled the situation in *First National Maintenance* than in *Fibreboard* turns on the particular facts of this case and, consequently, is not of sufficiently broad significance to warrant this Court's review.[7]

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[6] The Sixth Circuit has expressly applied the "clear and unmistakable" waiver standard in several recent cases. See, *e.g.*, *Gratiot Community Hosp.* v. *NLRB*, 51 F.3d 1255, 1260 (1995); *NLRB* v. *Centra, Inc.*, 954 F.2d 366, 371 (1992), cert. denied, 513 U.S. 983 (1994); *NLRB* v. *Brown-Graves Lumber Co.*, 949 F.2d 194, 198 (1991). In this case, the court extensively discussed *Gratiot Community Hospital*, without suggesting any disagreement with that standard. See Pet. App. 7a-8a.

[7] Petitioner also challenges (Pet. 25-28) the court of appeals' conclusion that, "when the collective bargaining agreements between [ASCOA] and the unions with section 9(a) bargaining

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
Acting General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

MARCH 1998

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status terminated, rather than merely expired, upon the respective termination dates, and because the agreements did not provide otherwise, [ASCOA was] relinquished of any contractual or statutory obligations to the unions." Pet. App. 11a. But petitioner acknowledges (Pet. 26) that this issue, standing alone, does not warrant review. We agree. The court's statement is not necessary to its ruling that ASCOA did not violate Section 8(a)(5) in the circumstances of this case. Indeed, the dissenting judge joined that ruling, although he found the majority's distinction between "termination" and "expiration" of a collective bargaining agreement not to be "meaningful * * * *in the context of this case*." Pet. App. 16a.

No. 97-1249

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATED OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

vs.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

-and-

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS "AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.

MICHAEL BRITTAIN
Counsel of Record
DONALD F. WOODCOCK
TODD F. PALMER
T. SCOTT JOHNSON
CALFEE, HALTER & GRISWOLD LLP
Attorneys for Respondents
"Automatic" Sprinkler Corporation
Of America and Figgie International, Inc.
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
(216) 622-8200

145613

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Whether, after bargaining for and agreeing to a provision in the collective bargaining agreement granting the company rights that directly and foreseeably conflict with certain NRLA rights, a company must yet again bargain with the same union when the company decides to exercise its rights in strict compliance with the already accepted terms.

2. Whether, under *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), including a clause in a collective bargaining agreement that specifically authorizes the subcontracting of work to other union contractors "clearly and unambiguously" waives, or otherwise prospectively discharges, the NLRA duty to negotiate concerning either the decision to subcontract or the ultimate effects of such subcontracting.

3. Whether, when a company decides to terminate its relationship with a union according to the terms set forth in the collective bargaining agreement and ceases hiring union workers, the company is subject to the same obligations to maintain the status quo and negotiate in good faith as if the agreement had simply lapsed.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following is the parent company of respondent "Automatic" Sprinkler Corporation Of America: Figgie International Inc. There are no nonwholly owned subsidiaries of respondent "Automatic" Sprinkler Corporation Of America.

There are no parent companies of respondent Figgie International Inc. The following is a nonwholly owned subsidiary of respondent Figgie International Inc.: Oden Corporation, incorporated in the State of New York.

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STATEMENT OF THE CASE

Respondents "Automatic" Sprinkler Corporation Of America ("'Automatic'") and Figgie International Inc. ("Figgie") (collectively, the "Company Respondents") concur with Petitioner's statement that since the early 1900's, "Automatic" has been in the business of installing, maintaining, and inspecting automatic fire protection systems. The Company Respondents also agree that during "Automatic's" long history, it has hired union labor and been party to various collective bargaining relationships with various local unions (collectively, "Local Unions") of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United State and Canada, AFL-CIO, ("Union"), including Union Local 669. Because of the long history between the Union, its locals, and "Automatic," by the early 1990's, the parties' respective bargaining agents were sophisticated, experienced representatives, each able negotiators, each capable of protecting the interests of their constituencies in the collective bargaining process.

As of 1992, "Automatic" employed well over 300 Union employees nationwide. All of the Union employees were covered by collective bargaining agreements negotiated by the employees' selected representatives. By 1992, clauses permitting "Automatic" to subcontract work had been negotiated into all but one of the collective bargaining agreements.[1] The Union

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1. The Petitioner attempts to characterize these subcontracting clauses as "traditional 'construction industry' subcontracting clauses" and attempts to excuse the Union's and their local's acquiescence to the terms because "experience" indicated that Automatic rarely invoked the subcontracting right. Pet. pp. 3-4. Whatever their reasons for agreeing to the clauses, the Petitioner does not and cannot contest their validity. Further, eleven of the (Cont'd)

was undoubtedly mindful that such clauses, without restrictions, could be used to move work from Union to non-union labor sources. Accordingly, the clauses permitted subcontracting only to contractors who were signatory to a collective bargaining agreement with the Local Unions.

As was their annual practice, in 1992 the management of "Automatic" and Figgie met and reviewed the long-term financial prospects for their companies. The companies operated according to five-year budget projection plans, referred to as "hardcore" plans. During these annual meetings it was the practice of management to review the past performance of each company against its hardcore plan and use the information gleaned to revise the forward-looking budget projections and modify that company's operating procedures.

"Automatic" was experiencing financial difficulties during the years leading up to the 1992 review. Pet. App. p. 3a. Accordingly, during that review, options for improving "Automatic's" financial performance were considered.

The Company Respondents agree with Petitioners that the major cost component of fire protection system work is the cost of labor. Pet. p. 3. Therefore, predictably, "Automatic's" management considered options for controlling or reducing their labor costs. "Automatic's" management also explored ways to improve the company's financial performance by increasing the company's sales. But, in order to improve sales, the company needed to penetrate new geographic market areas and new market segments, including non-union market areas and segments.

(Cont'd)
twelve collective bargaining agreements with the Local Union contained subcontracting clauses. Pet App. pp. 3a. That a subcontracting clause was not included in all twelve agreements belies Petitioner's "industry standard" characterization.

Previously, "Automatic" had been unsuccessful penetrating non-union markets because of its relatively higher, Union-based labor costs.

"Automatic's" and Figgie's management settled upon a plan, termed the "Neutral Plan," as a means of combating "Automatic's" financial problems. Pet. App. p. 3a. The Neutral Plan contemplated "Automatic's" transformation from a combined sprinkler design and installation contractor to a design contractor utilizing subcontract labor for installation. By employing subcontract labor, "Automatic" expected to realize a number of immediate financial benefits.

> The Neutral Plan was expected to result in various benefits, including: gaining control of labor costs; elimination of negotiations with unions and the cost of grievances; minimization of excessive labor costs on some contracts; reduction of administrative labor costs and vehicle costs; elimination of road tool costs; ability to bid on both union and non-union projects; and entrance into the residential market.

Pet. App. p. 3a. The plan's adoption represented a fundamental change in "Automatic's" business.

In 1993, "Automatic" subcontracted more of its installation work. The work was subcontracted in accordance with the expressed terms of "Automatic's" existing collective bargaining agreements, and, in particular, the subcontracting clauses contained therein. "Automatic" subcontracted with contractors operating under their own collective bargaining agreements with the respective Local Unions. Pet. App. p. 3a. As more installation work was subcontracted, less such work was done "in-house." Consequently, over time, "Automatic" directly employed fewer and fewer Union workers. Eventually,

"Automatic" completely ceased employing Union workers. With no Union workforce, "Automatic" either allowed the now expiring collective bargaining agreements to lapse or terminated them outright.

The Petitioner characterizes "Automatic's" shift to subcontracting as the permanent discharge of more than 300 Union employees. Pet. p. 4. This description, while technically accurate in a very narrow sense, is a distortion of the real ***shift*** in employment that transpired. "Automatic" took surprising steps, far in excess of those required by the collective bargaining agreements, to facilitate the transference of their employees into the subcontracting workforce — and transfer they did.

> After termination of the various Local's contracts, a number of the [Automatic] employees who had lost their jobs with the implementation of the "Neutral Plan" became subcontractors to [Automatic] *with the aid of* [*Automatic*] including the use of vehicles and other equipment which the subcontractors bought or leased from [Automatic]. Some of [Automatic]'s new subcontractors undertook that role *at the suggestion and encouragement of* [*Automatic*] *officials* who were instructed to do so by their superiors. Many other employees became employees of subcontractors. *This is not surprising given the special expertise they possessed in sprinklerfitting.*

Pet. App. p. 79a. (Administrative Law Judge Findings of Fact adopted by the NLRB) (emphasis added).

Petitioner's description of "phase two" of the Neutral Plan is simply wrong. Petitioner suggests that once "Automatic" was free of the collective bargaining agreements and the Local Unions, it planned immediately and completely to cease

employing union workers in any capacity, including in its subcontracted work. Pet. p. 5. Petitioner's assertion is supported by neither the Sixth Circuit's nor the NLRB's opinions, and it is simply not true.

The Neutral Plan was intended to "position" "Automatic" "neutrally" in the workplace (neither union nor non-union) so that it could compete for both union and non-union projects.[2] Admittedly, "Automatic" sought the flexibility to compete in non-union markets using, if necessary, non-union workers once the collective bargaining agreements expired or were terminated. However, "Automatic" also sought to continue to operate in its traditional Union markets — using Union subcontractors — as well. In fact, the Sixth Circuit noted that "Automatic" continued to subcontract almost exclusively with Union contractors well after the collective bargaining agreements had expired or terminated.[3] Pet. App. p. 4a.

"Automatic" provided the Local Unions notices of its business changes throughout the Neutral Plan's implementation. On February 10, 1993, "Automatic" withdrew its membership in the National Fire Sprinkler Association ("NFSA"), the employer association tasked with Union negotiations. The next day, "Automatic" notified the Local Unions of the withdrawal. On May 26, 1993, "Automatic" gave Local 483 and Local 709 notice of the termination of their collective bargaining agreements effective August 1, 1993 and September 1, 1993, respectively. Pet. App. p. 3a. On January 28, 1994, "Automatic" notified the remaining Local Unions of its decision to discontinue directly hiring Union workers. Pet. App. p. 4a. Each of the

2. *See* Pet. App. pp. 44a-46a. ("Neutral Plan" description).

3. For "Automatic" to completely forego its traditional union markets, as Petitioners would have this Court believe was its plan, would be akin to committing economic suicide.

January 28 letters offered to negotiate with the respective Local Unions concerning the decision and its effects on the Union workers. Pet. App. pp. 48a-49a. Although the number and nature of the ensuing exchanges between "Automatic" and the Local Unions varied, the NLRB concluded that "Automatic" had refused to negotiate successor bargaining agreements with any of the Unions.[4] Pet. App. p. 4a.

In its Statement of the Case, Petitioner engages in a lengthy dissertation intermixing statements of facts with arguments at law concerning the Administrative Law Judge's conclusion, adopted by the NLRB, that "Automatic's" implementation of the Neutral Plan was motivated by anti-union animus in violation of § 8(a)(3) of the NLRA. Pet. pp. 5-9. On appeal, this conclusion was vigorously challenged by the Company Respondents as clearly erroneous. In its opinion, the Sixth Circuit strongly intimated its skepticism about the NLRB's conclusion.[5] However, the Sixth Circuit did not need to address

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4. On appeal, the Company Respondents vigorously challenged the NLRB's findings that Automatic refused to negotiate regarding the effects of the subcontracting and the resulting changes in its business as clearly erroneous. Because the Sixth Circuit concluded that Automatic had no duty to negotiate concerning the subcontracting, the Court did not address the propriety of the NLRB's conclusions concerning negotiations.

5. The relevant part of the opinion states:

> The [NLRB] in the present case found the benefits expected to result from the Neutral Plan — gaining control of labor costs, eliminating labor negotiations, eliminating costs associated with union grievances, and allowing Automatic to become competitive against non-union contractors — to be direct evidence that the [Company Respondents'] actions of subcontracting unit

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or resolve the issue because the Court instead concluded that, independent of the motivation behind implementing the Neutral Plan, "Automatic" had negotiated for and obtained the right to subcontract. So long as "Automatic's" actions with regard to the Neutral Plan's implementation conformed to the terms of the subcontracting rights previously negotiated, there was no violation of the National Labor Relations Act ("NLRA"). Pet. App. pp. 11a-15a.

REASONS FOR DENYING THE WRIT

The Petitioner struggles to fashion conflict and discord among the Circuits where none exists in a vain attempt to pique this Court's interest and obtain the desired writ. Petitioner begins the attempt by reviewing the history and arguing the importance of this Court's waiver doctrine decisions. Pet. pp. 13-16. Then, Petitioner claims conflict between the Sixth, Seventh and D.C. Circuits and the Tenth Circuit concerning whether an expressed contractual agreement between an employer and the employees' elected bargaining representative can be a "clear and unmistakable" waiver of an important NLRA right. Pet. pp. 16-21. Then, the Petitioner claims conflict between the Sixth Circuit and nearly every other Circuit over whether the standard for waiver should be a "clear and unmistakable" expression of that waiver or something different. Pet. pp. 21-25. Finally, as

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> work and discharging unit employees were motivated by anti-union animus. [Company Respondents] also expected the Neutral Plan to result in the reduction of vehicle costs, the elimination of road tool costs, and entrance into the residential market. Those are legitimate reasons for the decision to adopt the Plan as is the desire to fundamentally change the nature of Automatic's base of business from construction to service.

Pet. App. pp. 14a-15a.

an ancillary reason for granting the writ, Petitioner claims that the Sixth Circuit erred in distinguishing between contract "terminations" and "expirations" for purposes of imposing continuing duties owed to the Local Union. Pet. pp. 25-28. We will address each of these arguments in turn.

I.

THE SIXTH CIRCUIT'S DECISION IS COMPLETELY IN ACCORD WITH THIS COURT'S PRONOUNCEMENTS CONCERNING THE CONTRACTUAL WAIVER OF NRLA RIGHTS.

Framed properly, the issue over which Petitioner now claims conflict, is whether an expressed contractual provision contained in a collective bargaining agreement acts as a waiver of the union employees' right to bargain over important NRLA rights. This Court has repeatedly addressed this issue, and the Sixth Circuit has properly applied this Court's decisions on the matter.

The issue of contractual waiver was first considered by this Court in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In *Mastro*, the company asserted that a general "no-strike" clause in its collective bargaining agreement justified certain actions taken in response to an unfair labor practices strike. The company argued that the clause prohibited all strikes, even those over unfair labor practices.

The *Mastro* Court began its analysis noting:

> we assume that the employees, by *explicit contractual provision*, could have waived their right to strike against such unfair labor practices . . . the question[] before us [is] whether or not such a waiver was made by the [Union] in their 1949-1950 contract.

350 U.S. at 279 (emphasis added). However, the Court concluded that the contract clause relied upon by the Company was ineffective as a waiver. The *Mastro* Court reasoned that whether a particular clause constituted a waiver turned upon "the proper interpretation of the particular contract before us." *Id.* The contract clause relied upon by the Company made no specific reference to unfair labor practice strikes; it simply prohibited strikes, generally. The *Mastro* Court found this language insufficient reasoning that the employees' right to strike against unfair labor practices was so substantial that a "more compelling expression" of waiver was required to waive the right. *Id.* at 283.

This Court again considered the issue of contractual waiver squarely in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The dispute in *Metropolitan Edison* likewise centered on a collective bargaining agreement; only this time a clause prohibiting unlawful work stoppages was at issue. *Id. at 695.* The company used the clause to justify imposing greater sanctions on union officials than on its other employees after such work stoppages. Twice, arbitrators upheld the disparate treatment of the union officials. When the union later filed an unfair labor practice charge, the company argued that the Union had waived its NRLA protections by failing to negotiate concerning the collective bargaining agreement clause in the face of the two adverse arbitration rulings.

The *Metropolitan Edison* Court, like the *Mastro* Court, reaffirmed that "a union may waive a member's statutorily protected rights."[6] *Id.* at 705. Further, the *Metropolitan Edison*

6. The *Metropolitan Edison* Court also reaffirmed this Court's earlier limitation on the authority of a union to waive certain statutory rights where the union's interest might diverge from that of the represented employees. For example, a union cannot bargain away (Cont'd)

Court adopted the *Mastro* Court's statement that a waiver could be "explicitly stated" in a collective bargaining agreement. *Id.* at 708. The *Metropolitan Edison* Court went on to say that an "explicitly stated" waiver is one that is clear and unmistakable:

> [W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.

Id. The *Metropolitan Edison* Court formulated the "clear and unmistakable" standard for waiver of statutorily protected rights in the context of evaluating a general contractual provision. Thus, traced back to its roots, the "clear and unmistakable" standard has its genesis in a review of the effect of a contractual provision.

The Sixth Circuit's post-*Metropolitan Edison* decisions — including the decision in the instant case — have exhibited nothing but fidelity to the "clear and unmistakable" waiver standard announced in that case. The Sixth Circuit first recognized the "clear and unmistakable" waiver standard in *Local Union 1392, Intern. Bro. Of Elec. Workers v. NLRB*, 786 F.2d 733 (6th Cir. 1986). In that case, the court reviewed the language of a collective bargaining agreement regarding whether the union had waived its officials' statutory right to be free from selective discipline stemming from unauthorized work stoppages. *Id.* at 734. The court, citing to *Metropolitan Edison*,

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important § 7 rights where the waiver might entrench that union as the employees' representative and inhibit another union from successfully communicating with the employees or otherwise challenging the current union's representation. *See NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322 (1974).

found that the contractual language was sufficient to establish a waiver. *Id.* at 735.

Thereafter, the Sixth Circuit revisited the issue of a contractual waiver in *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854 (6th Cir. 1989). In that case, the court considered whether the collective bargaining agreement's management rights clause granted the employer the right to transfer production to other facilities without bargaining about the relocation. *Id.* at 855. Specifically, the court reviewed the Board's prior determination that the management rights clause did not grant the employer the right to relocate production in "clear and unmistakable" language. *Id.* at 858. Citing to *Metropolitan Edison*, and noting "the explicit reference to layoffs and production methods in the management rights clause," the court rejected the Board's finding as not supported by substantial evidence. *Id. See also East Tennessee Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993) (no "clear and unmistakable" waiver where contract is silent on issue); *NLRB v. Mead Corp.*, 73 F.3d 74, 79 (6th Cir. 1996) (no "clear and unmistakable" waiver absent contract language specifically addressing the purportedly waived right); *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1289 (6th Cir. 1997) (citing to *Metropolitan Edison*, court found that collective bargaining agreement granted employer the right to eliminate its third shift without prior notice or bargaining).

In the instant case, the Sixth Circuit found that the Company Respondents had no duty to bargain over the subcontracting, in that "Petitioners and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements." Pet. App. p. 7a. By so finding, the court below did not, as claimed by Petitioner, reject or otherwise deviate from the "clear and unmistakable" waiver standard articulated by *Metropolitan Edison*.

In evaluating the Company Respondents' contractual right to subcontract, the court below relied on its analysis of a contractual waiver claim in *Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255 (6th Cir. 1995). In *Gratiot*, the employer negotiated a special "7/70" staffing program for its employees with the union. Pursuant to the terms of the collective bargaining agreement, the employer retained the authority to "decide the number of assignments and the work areas" under the program. *Id.* at 1258. When the hospital discontinued the program, the union sought to negotiate. The hospital refused, asserting that the terms of the collective bargaining agreement permitted the hospital to reduce the number of teams assigned under the program including reducing the number to zero. *Id.* Applying principles of the "clear and unmistakable" waiver standard, the Sixth Circuit found:

> [T]he language of [the 7/70 clause] is *clear* and *unambiguous* in granting the authority to the Hospital to determine the number of shifts, including zero, in the 7/70 program. Consequently, the Hospital's actions with respect to the 7/70 program were not in violation of the [NLRA].

Id. at 1261 (emphasis added). The Sixth Circuit also reasoned in *Gratiot* that:

> [W]hen an employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules that govern their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain with respect to a matter covered by the contract.

Id.

In the instant appeal, the Sixth Circuit concluded, rightly, that the Union had waived its right to negotiate over subcontracting. The Sixth Circuit found that "Automatic" and the Local Unions had bargained over subcontracting.

> Here, [Company Respondents] and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements. This bargain permitted [Company Respondents] to contract out work as long as it was to a contractor who had a collective bargaining agreement with the local union. Because the collective bargaining agreements contain no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the [NLRB] has no authority to compel [Company Respondents] to bargain with the unions over that subject.

Pet. App. p. 7a. With the subcontracting right secured in the collective bargaining process, the Sixth Circuit concluded that, like in *Gratiot Community Hosp.*, the bargained for right waived the Local Unions' NLRA rights.

> [In *Gratiot Community Hosp.*], we found that the actions by the hospital did not violate the [NLRA] because the language in the collective bargaining agreement *clearly* and *unambiguously* granted the hospital the authority to determine the number of shifts, including zero, in the 7/70 program.
>
> Similarly, the language in the collective bargaining agreements in the present case *unambiguously* granted [Company Respondents] the authority to subcontract work, without limitation,

> provided it was to contractors that had agreements with the unions.

Pet. App. p. 8a (emphasis added). Consequently, the Sixth Circuit ruled that the Local Unions were estopped from asserting NRLA violations based upon "Automatic's" subcontracting and implementation of the Neutral Plan. Pet App. pp. 7a, 9a, 14a-15a.

Contrary to Petitioner's claim that the instant case marks the Sixth Circuit's rejection of *Metropolitan Edison*, *see* Pet. p. 23, this case is completely in keeping with this Court's waiver doctrine as announced in both *Mastro* and *Metropolitan Edison*.[7] *Metropolitan Edison* mandates a review of a general contractual provision to determine whether there is a clear and unmistakable waiver of a statutorily protected right. *Metropolitan Edison*, 460 U.S. at 708. In the instant case, the Sixth Circuit did precisely that. While the court below may not have delineated to Petitioner's satisfaction the "clear and unmistakable waiver" phraseology embodied in *Metropolitan Edison*, the court clearly evaluated the language of the collective bargaining agreement to arrive at the conclusion that the Company Respondents had no duty to bargain over the subcontracting decision. Accordingly, the Sixth Circuit's decision does not mark a rejection of the principles of *Metropolitan Edison*.

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7. The Seventh and D.C. Circuits have also considered the issue of expressed contractual waivers of NLRA rights. *See Conoco Inc. v. NLRB*, 91 F.3d 1523 (7th Cir. 1996); *Dep't of Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992).

II.

THE SIXTH CIRCUIT'S DECISION HERE DOES NOT CONFLICT WITH THE TENTH CIRCUIT'S DECISION IN *CAPITOL STEEL & IRON CO. v. NLRB*, 89 F.3d 692 (10th Cir. 1996).

First, the Tenth Circuit's decision in *Capitol Steel* is both factually and legally distinguishable from the Sixth Circuit's decision in the instant case. Second, the Tenth Circuit's decision is completely reconcilable with the Sixth Circuit's decision and with this Court's pronouncements in *Mastro* and *Metropolitan Edison*.

In *Capitol Steel*, the management of a company embroiled in the collective bargaining process attempted to use a right granted under the collective bargaining agreement to improperly influence the collective bargaining process in an unforeseen and unforeseeable manner. The employer and union were engaged in negotiating a new collective bargaining agreement. Under the old agreement, the employer had the right to " 'pay wages in excess of the minimum requirements . . . to one or more employees in different amounts to different employees.' " *Id.* at 693 (citing the NLRB opinion). As negotiations towards a new agreement were coming to a close, the employer attempted to improperly influence the Union and its membership by selectively and overtly giving out raises to certain employees.[8]

8. For example, raise notices were distributed to select union members as they left the plant to attend a post-negotiation union meeting. *Id.* at 694. Also, a company officer "appeared" at a union meeting to distribute two more raise notifications to members of the union's negotiating committee. The Tenth Circuit found that the raises were intended to influence the collective bargaining process. The company's president "testified that these raises were given to reward employee performance, and to convince the employees 'to

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> Spurred by the appearance of a company representative at the Union meeting, by the Company's attempt to influence voting by its distribution of raises just before and during the meeting, and by its failure to supply specific information on the raises, the group voted to strike.

Id. The company thereafter refused to negotiate on wages and began hiring replacement workers. The union, in turn, filed unfair labor practice charges, and the Board found that the company's conduct violated §§ 8(a)(1) and 8(a)(5) of the NLRA. *Id.* at 695.

On review, the company claimed that it had exercised its valid contractual right to increase or decrease individual employee's wages whenever and however it chose. *Id.* at 696. Paying homage to *Metropolitan Edison*'s "clear and unmistakable" waiver language, the Tenth Circuit affirmed the Board's finding of § 8(a)(1) and § 8(a)(5) violations. *Id.* at 697. In so finding, the court noted that the timing and manner of the raises violated the company's duty to bargain, despite any waiver. *Id.* Indeed,

> when the Company undermined the union's role as the employees' sole bargaining agent by raising wages in a manner engineered to influence employees to vote in its favor at a key moment in the bargaining process, it improperly exploited that waiver and violated §§ 8(a)(5) and (1) of the NLRA.

Id.

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be on our side' as they went to the Union meeting to vote on the Company's proposal." *Id.* And, the Court concluded that the notices were distributed in a manner "calculated to sow dissension and demean the role of the Union." *Id.* at 697.

As an initial matter, *Capitol Steel* is legally inapposite to the instant case. Unlike the instant case, in which Petitioner claims that the Sixth Circuit's decision rides roughshod over employees' § 8(a)(3) right "to form, join and bargain collectively through their chosen representative free of employer anti-union retaliation," Pet. p. 11, the *Capitol Steel* case involved no allegation or finding of unlawful employer discrimination in violation of § 8(a)(3). Thus, *Capitol Steel* cannot be read as prohibiting waiver of employees' rights under § 8(a)(3) of the NLRA.

The *Capitol Steel* decision is also factually distinguishable from the instant case. In *Capitol Steel*, unlike the instant case, the collectively-bargained right did not directly and foreseeably implicate the NLRA rights that were later violated. As discussed above, under *Mastro* and *Metropolitan Edison*, a right granted in a collective bargaining agreement may effectively waive a NLRA right, provided that the waiver is "clear and unmistakable." It stands to reason that a clear conflict must exist between the bargained-for right and the NLRA statutory right claimed to have been waived before the necessary "clear and unmistakable" waiver can exist.

In *Capitol Steel*, the company's management attempted to use the bargained-for right in a completely unpredictable and unanticipated way. There, the company tried improperly to influence employee votes on the company's best and final contract offer, at the very hour the vote was being taken, and in the process, sought to undermine the union's leaders. *Id.* at 697. That the company's management would turn such a benign right into such a powerful weapon could not have been predicted. Accordingly, the union's agreement to the employer's right to grant individual raises cannot be reasonably interpreted as a waiver of the NLRA rights claimed.

In the instant case, the facts surrounding the Company Respondents' decision to subcontract do not approach the abuse of a contractual right found in *Capitol Steel*. Far from undermining the union by distributing pay raises to union leaders at the time and place when employees were voting on a contract proposal, the Company Respondents simply subcontracted work, far removed in time and place from the crucible of employee decision-making present in *Capitol Steel*. Indeed, far from undermining the union, as was the case in *Capitol Steel*, the Company Respondents' subcontracting resulted in the overwhelming amount of the work being subcontracted to union signatory companies. Moreover, unlike in *Capitol Steel*, the Sixth Circuit here concluded that the Local Unions, by consenting to the subcontracting clause with restriction only on **who** could be awarded subcontracted work, and not on **the amount of work** that could be subcontracted, had prospectively agreed to "Automatic's" plan to subcontract all its work. That "Automatic" might use the subcontracting right to do exactly what it did under the Neutral Plan was eminently predictable and foreseeable. It was so foreseeable, in fact, that the Local Unions sought to regulate the right by restricting "Automatic" to subcontracting with Local Unions, a restriction that "Automatic" scrupulously honored, to the tune of subcontracting 96.89 percent of the work to union subcontractors. *See Calatrello v. "Automatic" Sprinkler Corporation of America and Figgie International, Inc.*, 55 F.3d 208, 211 (6th Cir. 1995); *see also* Pet. App. p. 9a, n. 2. Thus, *Capitol Steel* is inapposite to the instant case, and therefore forms no basis for any finding of a conflict between the Sixth and Tenth Circuits.

III.

THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THE FIRST, SECOND, THIRD, FOURTH, FIFTH, EIGHT, NINTH AND TENTH CIRCUITS REGARDING THE APPLICATION OF THE *METROPOLITAN EDISON* "CLEAR AND UNMISTAKABLE" WAIVER STANDARD.

Petitioner asserts that the Sixth Circuit has adopted some standard other than the "clear and unmistakable" standard to find a waiver of an important NLRA right. We simply note, as was discussed in detail above, that the Sixth Circuit's decision is completely in keeping with the "clear and unmistakable" standard. Thus, Petitioner's claimed broader conflict is more contrived than real.[9]

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9. Further, all of the Circuit Court decisions cited by Petitioner are either factually distinct or easily reconcilable with the Sixth Circuit's decision here. Of the eight Circuit Court decisions that the Petitioner cites as in conflict, six do not address specific contractual waiver as an issue at all. Instead they addressed whether a waiver could be *implied* because of certain acts. *See NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996); *Porta-King Bldg. Systems v. NLRB*, 14 F.3d 1258 (8th Cir. 1994); *NLRB v. Litton Fin. Printing Div.*, 893 F.2d 1128 n.6 (9th Cir. 1990), *rev'd in part*, 501 U.S. 190 (1991); *Communication Workers of America v. NLRB*, 644 F.2d 923 (1st Cir. 1981); *Florida Steel Corp. v. NLRB*, 601 F.2d 125 (4th Cir. 1979); *Radio Television Technical School Inc. v. NLRB*, 488 F.2d 457 (3d Cir. 1973). Of the two decisions that tangentially addressed the issue of contractual waiver, one reaches the unremarkable conclusion that a general contract clause controlling access to employee records does not waive the union's right to access employee records in the grievance process. *See NLRB v. New York Telephone Co.*, 930 F.2d 1009 (2d Cir. 1991). In the remaining decision, the Fifth Circuit reached the equally unremarkable conclusion that a contract clause did not waive an important judicially determined right because the

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IV.

PETITIONER'S RELIANCE ON THE SECTION 8(d) "CONTRACT TERMINATION" RULING IS A RED HERRING.

First, Petitioner's sole argument here is that the case below was wrongly decided; Petitioner makes no claim of conflict. Second, whether rightly or wrongly decided, this issue is irrelevant to the Sixth Circuit's central holding and is largely immaterial to the resolution of the matter.

The dispute here centers on whether "Automatic" had a duty to negotiate in good faith and to maintain the status quo following the termination of certain of the collective bargaining agreements. The Sixth Circuit concluded that there was no such duty. Pet. App. p. 11a. The Sixth Circuit concluded that the act of terminating a collective bargaining agreement is fundamentally different than merely allowing one to lapse. Termination suggests the severing of a relationship and not merely the failure to reach new terms. Since the NLRA cannot force an employer to hire union labor when it has decided to do otherwise, it seems reasonable that once an organization decides to terminate its collective bargaining agreement, it is free to change the status quo and refuse to negotiate with the union. Pet. App. p. 11a. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

However, in the context of this case, the Sixth Circuit's decision is largely irrelevant. The Court's conclusion that the

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clause's negotiation predated judicial recognition of that right and because the parties had not focused on the right at the time of the negotiations. *Prudential Ins. Co. v. NLRB*, 661 F.2d 398 (5th Cir. Nov. 1981).

Company Respondents had an absolute right to subcontract their union work — including all their work — renders this issue a legal curiosity, nothing more. At the time that "Automatic" terminated its collective bargaining agreements with the various affected Local Unions, it had already fully subcontracted its union work and discontinued hiring union labor. So, even assuming the Sixth Circuit decided the issue wrongly, it is a distinction without a difference. What would it mean to "Automatic" to require it to maintain the status quo? "Automatic" would still be permitted to subcontract all of its work. Accordingly, "Automatic" would still not hire labor directly. Without a direct workforce, a collective bargaining agreement serves little meaningful purpose.

CONCLUSION

For the aforementioned reasons, Respondents "Automatic" Sprinkler Corporation of America and Figgie International Inc. respectfully urge this Court to deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL BRITTAIN
Counsel of Record
DONALD F. WOODCOCK
TODD F. PALMER
T. SCOTT JOHNSON
CALFEE, HALTER & GRISWOLD LLP
Attorneys for Respondents
"Automatic" Sprinkler Corporation
Of America and Figgie International, Inc.
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
(216) 622-8200

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARC D. KEFFER
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

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REPLY BRIEF FOR PETITIONER

The briefs by respondents National Labor Relations Board ("NLRB" or "The Board") and "Automatic" Sprinkler Corporation of American and Figgie International Inc. ("Automatic") in opposition to our certiorari petition present a veritable encyclopedia of obfuscation -- *viz.*, of the techniques of purporting to respond to, and to rebut a certiorari petition's "reasons for granting the writ" while studiously refusing to join issue on the points made in the petition.

We therefore briefly restate each of the two basic questions presented and our showing as to why these questions require consideration by this Court -- in order to refocus what respondents seek to obscure. As to each of these questions, we

then briefly demonstrate that, while respondents' briefs in opposition cover some 35 pages with type, those pages do not make a single point of substance that controverts our showing. In the end, our "reasons for granting the writ" remain unrefuted and, we submit, call for a certiorari grant here.

1. (a) The first question our petition presents is whether the NLRA §§ 7/8(a)(3) employee right to select and to act through a collective bargaining representative free from unlawful employer discrimination can be waived through the inclusion in a collective bargaining agreement of a general contract clause authorizing a generic type of employer business action -- such as subcontracting unit work or making periodic wage adjustments -- notwithstanding this Court's admonition that the policies of the NLRA do not provide for the contractual waiver of "unlawful practices destructive of the foundation on which collective bargaining must rest." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280-83 (1956); Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 706, n.11 (1983).

We pointed out that the Sixth Circuit's decision in this case is at odds both with this Court's decisions in Mastro Plastics and Metropolitan Edison, and with the Tenth Circuit's recent decision in Capitol Steel and Iron Co. v. NLRB, 89 F.3d 692, 697 (10th Cir 1996) (affirming an NLRB decision and rejecting the claim that a collective bargaining agreement permitting individual wage increases waived employees' statutory right against employer's selective imposition of mid-term wage increases motivated by an intent to undermine the union's status as the employees' bargaining representative).[1]

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[1]Automatic would distinguish Capitol Steel from the instant case in that the employer's conduct in that case consisted of "raising wages in a manner engineered to influence employees to vote at a key moment in

And, we stressed that the NLRA waiver doctrine questions presented here go to the very essence of the Act and that the longstanding uncertainty in the governing law, as exacerbated by the decision below, puts the NLRA collective bargaining system under the most severe strain in a way that threatens its productive capacities. Pet. 9-21.

(b) Automatic proceeds by simply pretending that no such question is presented. According to the Company, "the issue over which Petitioner now claims conflict is whether an expressed contractual provision contained in a collective bargaining agreement acts as a waiver of the union employees' right to bargain over important NLRA rights." Automatic Opp. at 8.

But the question so kindly "[re]framed" for us by Automatic as the *only* question presented bypasses the first question presented in our petition and tracks the second question we presented. And, contrary to Automatic, *both* of these questions *are* presented by this case.

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the bargaining process" and Automatic's conduct in this case, as found by the NLRB, was the "subcontract[ing of] the unit work... motivated [by a desire] ... to rid itself of union-represented employees." Automatic Opp.. at 16-18. See Pet. App. 30a.

The point would appear to be that while Capitol Steel's "unlawful practice" *is* "destructive of the foundation on which collective bargaining must rest," an employer's subcontract of an entire bargaining unit's work and the discharge of all unit employees "in order to rid itself of union-represented employees" is not. The opposite is true. While suborning bargaining unit employees so as to undermine their support for their union representative is reprehensible and destructive, that wrong pales in comparison to a maneuver to discharge an entire workforce because the employees have selected and bargained through a union and so as to replace the union employees with a non-union workforce.

With regard to the §§ 7/8(a)(3) employee rights waiver issue here, the Board ruled that

> [a]lthough the clauses do permit subcontracting to other employers signatory to incumbent unions' agreements, they certainly do not permit subcontracting to nonunion firms, nor do they prohibit bargaining on subcontracting upon the expiration of the collective-bargaining agreements. They do not waive the right to bargain over a decision to destroy bargaining units through the use of subcontracting or the implementation of such a decision. [Pet. App. 83a]

And, the court of appeals, *inter alia*, overturned that ruling stating:

> *Regardless* of whether [Automatic] met [its] burden [of disproving that its decision to completely subcontract out all unit work was motivated by antiunion animus in violation of § 8(a)(3)]... [its] actions were *justified* under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that Petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is *legally* erroneous. [Pet. App. 15a, emphasis added.]

(c) While the NLRB has the grace to recognize that there are two questions properly presented here, the Board professes to have doubts as whether the Sixth Circuit actually decided the §§ 7/8(a)(3) employee rights waiver issue that the court said it was deciding in the above-quoted passage, and also as to whether the Sixth Circuit's ruling on that issue is one of

"general application" or is instead based solely on "the particular facts of this case." NLRB Opp. at. 11-13.

As to the first "doubt," it is difficult to understand how anyone could misunderstand the brutally direct language of the court of appeals. To be sure, the Board observes that the court of appeals' holding was expressed in a "few words," rather than many, and without "address[ing]" the "consist[ency]" of the ruling with decisions "of this Court or other courts of appeals," from which the Board concludes that the decision is "limited to the particular facts of [the particular] case." NLRB Opp. at 11. With all due respect to the Board's skill in the deconstructive reading of texts, the court of appeals' ruling is phrased so as to leave no doubt that it is of general application and not limited to the facts of this case. And, of course, the Board's suggestion as to how to parse court of appeals decisions is an invitation to the worst kind of decision-making through review-resistant *ipse dixit*.

As to the second of the Board's "doubts," the court of appeals expressly disavowed any intent to quarrel with, much less to overrule, the Board's factual findings. Pet. App.4a-5a.

The truth of the matter is that the Board was more candid and accurate in its petition for rehearing to the Sixth Circuit than it chooses to be with this Court:

> The issues raised [by the Sixth Circuit's "waiver" analysis] are important and likely to recur. Union signatory subcontracting clauses like those considered by the panel majority have long been part of the pattern of bargaining in the construction industry... The panel majority's holding that such clauses are a license to discriminate against employees who select union

> representation pose a serious danger both to the right of employees to be represented by unions of their own choosing and to the stability of the many collective bargaining agreements that include identical subcontracting clauses. [NLRB Reh. Pet. at 3-4.]

And, as to whether the Sixth Circuit's opinion is tied to "the particular facts of this case," NLRB Opp. at 13, the Board's petition for rehearing also recognized that the Sixth Circuit decided a "legal issue" and that, in so doing, the court below issued a ruling that "is in conflict with controlling authority that unions may not validly contract away the employees' free choice in the selection of a bargaining representative." NLRB Reh. Pet. at 7-8.[2] Indeed, nothing could be more clear than that the issue of a contractual waiver of statutory rights is an intrinsically *legal* rather than factual question. See e.g. C&P

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[2]In another of its deep readings of the Sixth Circuit's decision, the Board suggests that the court below "viewed this case as involving a situation more like that in First National Maintenance [Corp. v. NLRB, 452 U.S. 666 (1981)], which held that the Act did not mandate bargaining about an employer's decision to change significantly the nature of its business." NLRB Opp. at 13. This intuition does not buttress the decision below or make it one "turn[ing] on the particular facts of this case" (NLRB Opp. at 13), but rather suggests that the court of appeals rested its decision on a different error of law. For, as the Board itself pointed out in its petition for rehearing to the Sixth Circuit, as well as in its decision below,

> even if... those subcontracting decisions more closely resembled the partial closing decisions that... [have been] held outside the duty to bargain... decisional law holds that partial closing decisions are subject to the duty to bargain if motivated by antiunion animus. [NLRB Reh. Pet. at 11, citing First National Maintenance, supra, 452 U.S. at 673 n.9, 682 and 687-88.]

See Pet. App. 32a.

Telephone Co. v. NLRB, 687 F.2d 633, 636 (2nd Cir. 1982).[3]

The Sixth Circuit's decision thus squarely presents the question whether a general clause in a collective bargaining agreement can be held to "waive" the covered unit employees' §§ 7/8(a)(3) rights -- an *important* question on which the law is uncertain.

2. The second question presented is whether an alleged contractual waiver of the NLRA §§ 7/8(a)(5)/8(d) employee rights to bargain is governed by the "clear and unmistakable" waiver standard or the "contract coverage" waiver standard. As we showed in our petition, there is a widespread, long standing division in the courts of appeals on this important question that pits the First, Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits against the D.C., Seventh, and Sixth Circuits. Pet. at. 21-25.[4] The respondents offer rebuttals to our showing

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[3]The Board's assertion that Automatic "did not raise the subcontracting clause as a defense to the Section 8(a)(3) charge before the National Labor Relations Board..." (NLRB Opp. at 11) is simply incorrect. See, e.g., Automatic's Answer to the NLRB Complaint, para. 35 ("...the allegations of the Complaint are barred by the express and unequivocal waiver by [the Unions]... in that the collective bargaining agreements... permit... unlimited subcontracting"); Automatic's Exceptions to the Administrative Law Judge's decision, p.47 ("During the term of the respective Contracts... there had been... a clear and unequivocal waiver on the part of the charging party unions for [Automatic] to engage in subcontracting without limitation...").

[4]The recent and unpublished D.C. Circuit decision in Midwest Power Systems v. NLRB, No. 97-1251 [1998 U.S. App. LEXIS 4725] (D.C. Cir. Feb. 18, 1998) denying enforcement and remanding 323 NLRB No. 61 (1997), is further evidence, if any be needed, that the conflict among the circuits over which legal standard governs alleged contractual waivers of a statutory right persists unabated. The court noted that:

...in order to determine the effect of the reservation clause

that contradict -- and thus cancel out -- each other.

Automatic attempts to paper over the circuit split on this issue by claiming that the contract coverage standard of the Seventh and D.C. Circuits is "completely in keeping" with the "clear and unmistakable" waiver test employed by the majority of the circuits. Automatic Opp. at 14. In so doing, Automatic takes its turn at reinventing itself for purposes of opposing our petition. For Automatic argued to the Sixth Circuit that the court of appeals should reverse the NLRB's § 8(a)(5) unfair labor practice finding because the Board had committed error in applying a "clear and unmistakable" waiver standard rather than a "contract coverage" standard. Automatic grounded this argument in the recent Seventh and D.C. Circuit caselaw rejecting the "clear and unmistakable" waiver standard in favor

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> [incorporated by reference into the union agreement], we must decide if the proper inquiry is, as the Board assumed, whether there was a "waiver" of bargaining rights or rather if the inquiry should be whether the subject matter was "covered by" the collective bargaining clause. The former inquiry would require a determination of whether the surrender was "clear and unmistakable"; the latter would require application of the usual rules of contract interpretation. 1998 U.S. App. LEXIS 4725 at *4-*5.

The court granted the petition for review, denied enforcement of the NLRB's order, and remanded the case to be Board for consideration of whether that case could be decided "on narrower grounds," rather than undertake to "plunge into the thicket" presented by the foregoing passage and as exemplified by the Sixth Circuit's decision in this case. The Midwest Power Systems decision was issued under D.C. Cir. Rule 36(b) and we are "not citing [it] for precedential value but only... to show that the issue now before this court has been raised by other... circuits." U.S. v. One Parcel or Real Property, 908 F. Supp. 1070, 1076 n.3 (D.R.I. 1995).

of the "contract coverage" standard.[5]

The Board, in its turn, responds that, from time to time, the Sixth Circuit has cited both of the conflicting standards of waiver of statutory rights. NLRB Opp. at 13 and n.6. But confusion and disarray, *within a court of appeals* as well as among the circuit courts, underlines rather than undermines the depth of the conflict, the confusion in the lower courts and the need of this Court's review.

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[5] "...[B]y undertaking the 'waiver' analysis, the Board employed the wrong legal standard [and] this court must vacate and deny enforcement to the Board's order." Automatic Br. to the Sixth Circuit at pp.30, 27 citing, *inter alia*, NLRB v. U.S. Postal Service, 8 F.3d 832, 833 (D.C. Cir. 1993) ("The subject of subcontracting is therefore 'covered by' the collective bargaining agreements, such that 'waiver' analysis is inapposite ... [and] by undertaking the 'waiver' analysis, the Board employed the wrong legal standard ...") and Chicago Tribune Co. v. NLRB, 974 F. 2d 933, 936-37 (7th Cir. 1992) ("we wonder what the exact force of the 'clear and unmistakable' principle can be... or whether the principle makes much sense...").

CONCLUSION

For the reasons stated herein and in our petition, Local 669 urges that certiorari be granted.

Respectfully submitted,

WILLIAM W. OSBORNE, JR.,
MARC D. KEFFER
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036